TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. ~~164~~ 164.

WILLIAM P. CRAIGHILL, CHARLES F. POWELL, HENRY V. BOYNTON, SAMUEL P. LANGLEY, AND R. ROSS PERRY, CONSTITUTING AND COMPOSING THE COMMISSION TO SELECT THE LAND FOR ROCK CREEK PARK, APPELLANTS,

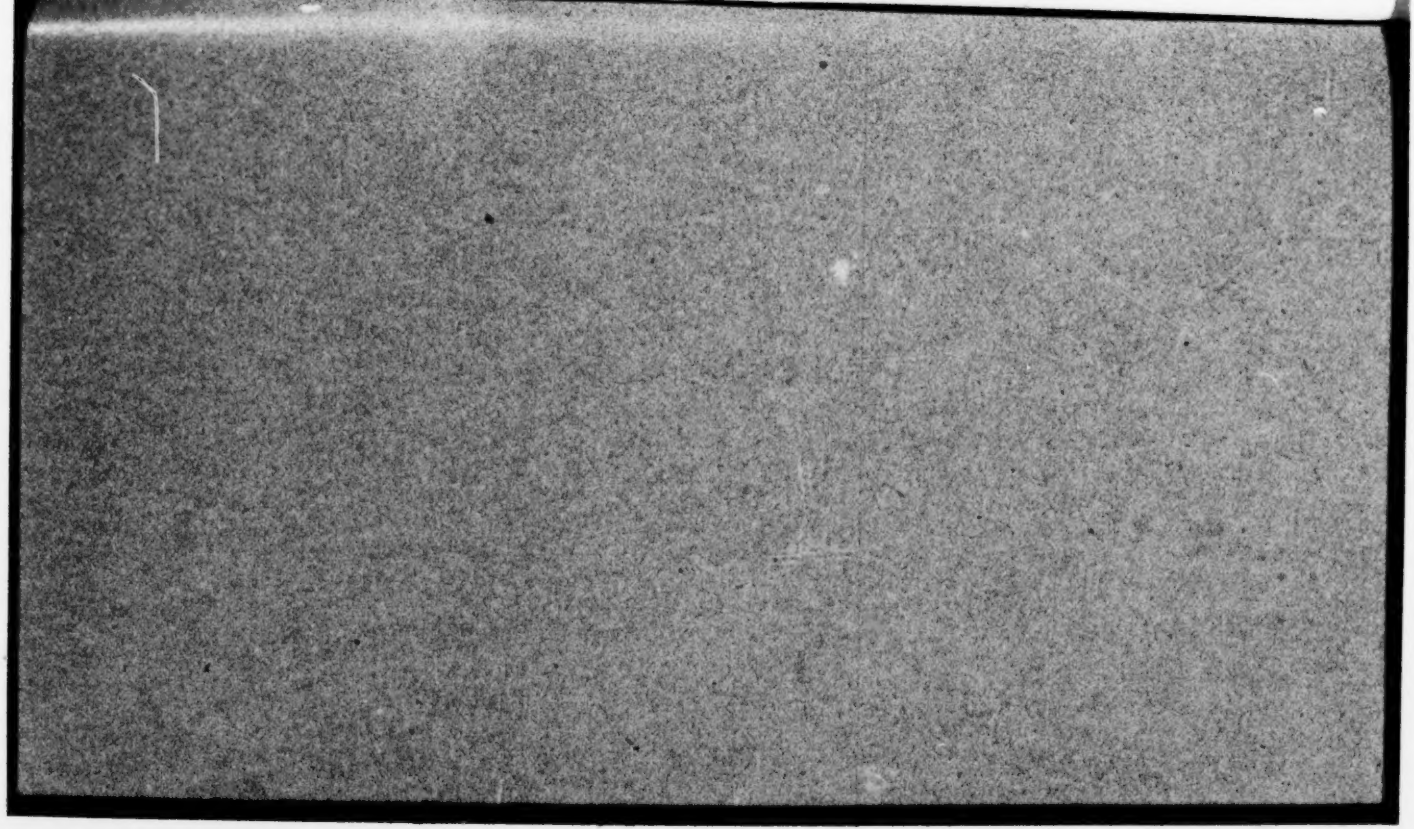
vs.

AVARILLA LAMBERT AND MARTINA CARR, CHILDREN AND SOLE HEIRS-AT-LAW OF JOHN VAN RISWICK, DECEASED, SURVIVORS.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED APRIL 29, 1896.

(16,271.)



(16,271.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 504.

WILLIAM P. CRAIGHILL, CHARLES F. POWELL, HENRY V. BOYNTON, SAMUEL P. LANGLEY, AND R. ROSS PERRY, CONSTITUTING AND COMPOSING THE COMMISSION TO SELECT THE LAND FOR ROCK CREEK PARK, APPELLANTS,

vs.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 29, 1897.

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1 In the Court of Appeals of the District of Columbia.

WILLIAM P. CRAIGHILL, CHARLES F. POWELL, HENRY V. BOYNTON, SAMUEL P. LANGLEY, and R. ROSS PERRY, Constituting and Composing the Commission to Select the Land for Rock Creek Park, Appellants,
vs.
MARY VAN RISWICK, Widow, AVARILLA LAMBERT and Martina Carr, Children and Sole Heirs-at-law of John Van Riswick, Deceased.
} No. 521.

Supreme Court of the District of Columbia.

MARY VAN RISWICK, Widow, and AVARILLA LAMBERT (*née* Avarilla Van Riswick) and Martina Carr (*née* Martina Van Riswick), Children and Sole Heirs-at-law of John Van Riswick, Deceased,
vs.
THOMAS LINCOLN CASEY, CHARLES F. POWELL, Henry V. Boynton, Samuel P. Langley, and R. Ross Perry, Constituting and Composing the Commission to Select the Land for Rock Creek Park.
} 16171, Equity Docket 38.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss*:

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

2 *Original Bill for Injunction.*

Filed January 19, 1895.

In the Supreme Court of the District of Columbia.

MARY VAN RISWICK, Widow, and AVARILLA Lambert (*née* Avarilla Van Riswick) and Martina Carr (*née* Martina Van Riswick), Children and Sole Heirs-at-law of John Van Riswick, Deceased,

vs.

THOMAS LINCOLN CASEY, Chief of Engineers of the United States Army; Charles F. Powell, Engineer Commissioner of the District of Columbia; Henry V. Boynton, Samuel P. Langley, and R. Ross Perry, Constituting and Composing the Commission to Select the Land for Rock Creek Park under and by Virtue of the Act of Congress entitled "An Act Authorizing the Establishing of a Public Park in the District of Columbia," Approved September 27, 1890.

16171, Eq. Dock. 38.

To the supreme court of the District of Columbia, holding a special term for the trial of equity causes:

Your complainants in and by their bill of complaint respectfully state as follows:

First. That they are citizens of the United States and residents of the District of Columbia, and bring this suit each in her own right, the complainant Mary Van Riswick as the widow and the complainants Avarilla Lambert (*née* Van Riswick) and Martina Carr (*née* Van Riswick) as the sole surviving heirs-at-law of John Van Riswick, deceased.

Second. That the defendants are citizens of the United States and residents of the District of Columbia and are sued as the commission for selecting the land for Rock Creek park, constituted under and by virtue of an act of the Congress of the United States entitled "An act authorizing the establishment of a public park in the District of Columbia," approved September 27, 1890, the defendants Thomas Lincoln Casey and Charles F. Powell being members thereof by official designation in said act, and the defendants Henry V. Boynton, Samuel P. Langley, and R. Ross Perry being members thereof by appointment of the President of the United States by and with the advice and consent of the Senate.

Third. That by the first section of said act it is provided as follows: "That a tract of land lying on both sides of Rock creek, beginning at Kingle Ford bridge and running northwardly, following

3 the course of said creek, of a width not less at any point than six hundred feet nor more than twelve hundred feet, including the bed of the creek, of which not less than two hundred feet shall be on either side of said creek, south of Broad Branch road and Blagden Mill road, and of such greater width north of said roads as the commissioners designated in this act may select, shall be secured, as hereinafter set out, and be perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States, to be known by the name of Rock Creek park: *Provided, however,* That the whole tract so to be selected and condemned under the provisions of this act shall not exceed two thousand acres nor the total cost thereof exceed the amount of money herein appropriated;" and by the second section thereof it is further provided as follows: "That the Chief of Engineers of the United States Army, the Engineer Commissioner of the District of Columbia, and three citizens to be appointed by the President by and with the advice and consent of the Senate be, and they are hereby, created a commission to select the land for said park of the quantity and within the limits aforesaid, and to have the same surveyed by the assistant to the said Engineer Commissioner of the District of Columbia in charge of public highways, which said assistant shall also act as executive officer of the said commission."

Fourth. That pursuant to the requirements of the third section of said act, the defendants having duly qualified as members of the aforesaid commission, caused to be made a map of said Rock Creek park, showing the location, quantity, and character of each parcel of private property which they designed to be taken for such purpose, with the names of the respective owners inscribed thereon, which map they afterwards, to wit, on the 19th day of April, 1891, filed and caused to be recorded among the public records of the District of Columbia, to wit, in the office of the recorder of deeds for said District, reference to which said map or the record thereof, as aforesaid, is hereby prayed that the same may be taken as part hereof on the hearing of this cause.

Fifth. That of the parcels of private property shown upon said recorded map of the Rock Creek park your complainant Mary Van Riswick was tenant in dower and your complainants Avarilla Lambert and Martina Carr were seized in their demesne as of fee in equal undivided moieties as tenants in common of, in, and to parcel numbered thirteen (13), containing twelve acres, more or less, and parcel numbered sixteen (16), containing one hundred and twenty-five acres, more or less, the first named as the widow and the two last as the children and sole surviving heirs-at-law of John Van Riswick, late of the District of Columbia, who departed this life intestate and seized in fee-simple of said real estate heretofore, to wit, on the 26th day of February, 1886, and your complainants are informed that their names are duly inscribed upon said map as owners of said parcels respectively.

Sixth. That upon the failure of the defendants to agree with the respective owners for the purchase of all of the parcels of private prop-

erty shown upon said recorded map and so selected and con-
4 demned at the price which had been approved by the Presi-
dent of the United States such further proceedings were thereupon had, on the petition of the defendants, that this honorable court thereafterwards, to wit, on the 9th day of July, 1891, in order to ascertain and assess the value of the land so selected and condemned, as prescribed by the aforesaid third section of said act, appointed three competent and disinterested commissioners to appraise the value or values thereof, and the said commission, having valued said parcels of land respectively, thereafterwards, to wit, on the 19th day of December, 1891, made return of their appraisement thereof unto this honorable court, as required by the said section of said act, whereby it appeared that the aggregate amount of said appraisement was in excess of the sum of twelve hundred thousand dollars; that thereupon the defendants, in order, as your complainants are informed and believe, and therefore charge, to bring the total cost of the land taken, including the expenses incident thereto, within the sum of twelve hundred thousand dollars, so as aforesaid appropriated for said park, caused to be made another and modified map of said Rock Creek park, showing a diminished area for said park and omitting therefrom the aforesaid parcels numbered, respectively, thirteen (13) and sixteen (16) among certain other parcels of private property exhibited, as aforesaid, upon the previously recorded map of said park, and the President of the United States having decided the prices of the several parcels of land shown upon the modified map—amounting, in the aggregate, to a much smaller sum than the sum of twelve hundred thousand dollars—to be reasonable, said appraisement was thereafterwards, to wit, on the — day of ——, 1892, approved by this honorable court, and said parcels numbered respectively thirteen (13) and sixteen (16) were thereafterwards, to wit, on the 15th day of July, 1892, by its order duly passed upon the application in that behalf of your complainants, finally and fully released and exonerated of and from the operation and effect of the aforesaid seizure and condemnation, all of which will more fully and at large appear, reference being had to the record of said condemnation proceedings, entitled "United States on the relation of the commission to select the land for Rock Creek park *vs.* Glen W. Cooper and others," numbered 366 on the district court docket of this honorable court, which it is prayed may be read and taken, so far as may be material, as part hereof upon the hearing of this cause.

Seventh. Your complainants further charge that it will further appear from said proceedings that the amount of the compensation so as aforesaid assessed for the lands taken and included within the said modified map of the Rock Creek park was thereafterwards from time to time, to wit, during the year 1893, fully paid and satisfied to the owners of the respective parcels of private property shown thereon upon successive reports of the special auditor appointed by this honorable court to investigate the titles to said parcels of private property and upon the order of the defendants, and that said amount, together with the expenses of inquiry,

5 survey, and assessment of said lands, has been paid exclusively from and out of the sum of one million two hundred thousand dollars appropriated in and by the sixth section of said act of Congress for the purpose, whereof the one-half is therein provided to be reimbursed to the Treasury of the United States out of the revenues of the District of Columbia in four equal annual installments, with interest at the rate of three per centum per annum upon the deferred payments.

Eighth. That heretofore, to wit, on the thirteenth day of July, 1892, your complainants, at the special instance and request of the defendants, communicated through the attorney of the United States for the District of Columbia, conveyed, without consideration of any kind whatever and by way of gift or donation, to the United States all that part of parcel numbered sixteen (16), bordering the Rock creek and forming a strip two hundred and fifty feet in width, extending from the center of said creek, and containing ten acres of land, more or less, as will appear, reference being had to the record of said deed or conveyance in Liber No. 1705, at folio 154, of the land records of the District of Columbia; and thereafterwards, to wit, on the twenty-fifth day of June, 1894, these complainants, at the like special instance and request of the defendants, conveyed to the United States, upon a consideration of five thousand six hundred and twenty-eight dollars—that being the price at which the land had been appraised by the appraising commissioners, and the defendants refusing to give more, although urged by the complainants to do so—a further part of the aforesaid parcel numbered sixteen (16), amounting to fourteen (14) acres thereof, as will appear, reference being had to the record of said deed or conveyance in liber numbered 1930, at folio 135, of the aforesaid land records of the District of Columbia; and these complainants further show that the entire contents of the aforesaid parcel numbered thirteen (13), together with the residue of parcel numbered sixteen (16), after deducting therefrom the parts so as aforesaid conveyed to the United States, are now held, owned, and possessed by your complainants according to their several and respective interests and estates therein, as hereinbefore set forth, and that said land immediately adjoins and -buts upon the said Rock Creek park and is necessarily included in the designation of land surrounding the same.

Ninth. That the cost of all the land taken or acquired by purchase for said Rock Creek park has been long since fully paid and satisfied to the owners of said land, and all and singular the expenses incident thereto have been fully paid from and out of the sum of one million and two hundred thousand dollars appropriated as aforesaid for the purpose in and by the sixth section of said act of Congress, whereof your complainants are informed and believe an unexpended balance yet remains in the Treasury of the United States subject to the orders of the defendants, and the one-half of the sum of money so appropriated and expended, with interest thereon at the rate of three per centum per annum, is being repaid and reimbursed to the United States in annual installments

6 in the manner provided by the said sixth section of said act

of Congress, from and out of the taxes annually levied within the said District of Columbia, on the basis afforded by the general assessment of the lands subject to taxation therein, including the aforesaid land of your complainants.

Tenth. Your complainants are advised and believe, and therefore charge, that with the full and entire payment of the cost of the land taken and purchased for said Rock Creek park and with the discharge and satisfaction of the expenses incident thereto the said Rock Creek park was finally and definitely established, and that with the establishing as aforesaid of said park the said park passed by operation of law, as expressed in the seventh section of said act of Congress, under the permanent and joint control of the Commissioners of the District of Columbia and the Chief of Engineers of the United States Army, to the exclusion of the defendants, who thereupon ceased to have or exercise any office, power, or authority whatever under the law in reference or regard to or any control over the said Rock Creek park.

Eleventh. That notwithstanding the premises and that the expenses of inquiry, survey, assessment, cost of land taken, and all other necessary expenses incidental thereto have been fully paid and satisfied from and out of the sum of one million two hundred thousand dollars appropriated for the purpose as aforesaid in and by the sixth section of said act, and notwithstanding that one-half of the sum so appropriated and expended is a present subsisting charge upon all the taxable lands within the District of Columbia, including the aforesaid land of your complainants, and is being repaid and reimbursed to the Treasury of the United States out of the general tax revenues of the District of Columbia in four equal annual installments, with interest at the rate of three per centum per annum, as is further provided by said sixth section of said act, and—

Notwithstanding the further fact that the need and occasion for creating a fund by assessment as for special benefits to the real estate in the District of Columbia by reason of the location and improvement of the said park, to be applied, as it only can be applied under the provision of the sixth section of said act, exclusively to the payment by the Treasurer of the United States, on the order of the defendants, to any persons entitled thereto as compensation for land or services, has been fully and completely anticipated and superceded by the expenditure as aforesaid of the appropriation of twelve hundred thousand dollars or of so much thereof as was needed for the purpose, and notwithstanding the said defendants were fully and finally discharged by the establishment of the park as aforesaid and by operation of law of and from the performance of any further office or function in connection therewith:

The defendants, nevertheless, erroneously claiming to act under the authority of said act, have lately given notice by advertisement in the daily newspapers printed and published in the city of Washington, in the District of Columbia, that they would, on Saturday,
7 the fifth day of January, A. D. 1895, at two o'clock p. m. in room numbered 31 in the city hall, sometimes called the

court-house, in the said city, hold their first meeting for the purpose of assessing the cost of the land taken for and now constituting the Rock Creek park, including the expenses of acquiring the said land, upon the lands, lots, and blocks, being real estate situate in the said District of Columbia, specially benefitted by reason of the location and improvement of said Rock Creek park, as nearly as may be in proportion to the benefits resulting to such real estate, and that if they shall find that the real estate in said District directly benefitted by reason of the location of the said Rock Creek park is not benefitted to the full extent of the said cost and expenses, then that they will assess each tract or parcel of land specially benefitted as aforesaid, in said District, to the extent of such benefits as they shall deem the said real estate specially benefitted by reason of the location and improvement of said Rock Creek park, and, further, that it is their intention to confine such assessment as they may make within such definable area as shall include lands, like the land of your complainants, surrounding said Rock Creek park, as will more fully appear, reference being had to a copy of the defendant's aforesaid advertised notice, which is hereto annexed as part hereof.

Rock Creek Park Commission—Assessment of Benefits.

CITY OF WASHINGTON, D. C., *December* 13, 1894.

To all whom it may concern:

This is to give notice that the commission to select the land for Rock Creek park, acting by authority of an act of Congress entitled "An act authorizing the establishing of a public park in the District of Columbia," said act approved September 27, 1890, have ascertained the cost of the land taken for and now constituting the said Rock Creek park, including the expenses of acquiring the said land. Further, this is to give notice that the said commission, acting under the said authority, will, on Saturday, the fifth day of January, A. D. 1895, at two o'clock p. m., in room numbered 31 in the city hall, sometimes called the court-house, in the said city, hold their first meeting for the purpose of assessing such proportion of such cost and expenses upon the lands, lots, and blocks, being real estate situated in the said District of Columbia, specially benefited by reason of the location and improvement of said Rock Creek park, as nearly as may be in proportion to the benefits resulting to said real estate, and if the said commission shall find that the real estate in said District directly benefited by reason of the location of the said Rock Creek park is not benefited to the full extent of the said cost and expenses, then they will assess each tract or parcel of land specially benefited as aforesaid in said District to the extent of such benefits as they shall deem the said real estate specially benefited by reason of the location and improvement of said Rock Creek park. In making the said assessment the said real estate benefited as aforesaid will be assessed by the description thereof which shall appear of record in the said District on the day of the said first meeting, to wit, January 5, 1895. All persons inter-

ested may appear and be heard at the time and place aforesaid of the said first meeting of the said commission for the said purpose, and the said persons are hereby notified to so appear if they or any of them desire to be heard in the premises. It is the purpose of the commission to first hear testimony as to the extent of surrounding land affected beneficially by the location and improvement of Rock Creek park.

THOS. LINCOLN CASEY,
Chief of Engineers, U. S. Army,
CHAS. F. POWELL,
Engineer Commissioner, D. C.,
H. V. BOYNTON,
S. P. LANGLEY,
R. ROSS PERRY,
Commission to Select the Land for Rock Creek Park.

Twelfth. That at the time and place designated in said advertisement your complainants, by their attorney and counsel, Tallmadge A. Lambert, Esquire, formally and in writing protested against the proposed assessment as for alleged benefits to real estate within the District of Columbia by reason of the location and improvement of said Rock Creek park for the reasons and upon the grounds specifically set forth and enumerated in their said paper-writing or protest (a copy whereof is herewith filed, marked Exhibit "A," and is prayed to be read as part hereof), and caused the same to be then and there filed with the defendants, who thereupon, after receiving like protests in writing from other owners of property within the District of Columbia liable to assessment, adjourned to meet again at the same place and hour on Saturday, the 19th day of January, 1895, for the purpose, as they avowed, of consulting the Attorney General of the United States in the meantime touching their powers and legal right to proceed with said assessment.

Thirteenth. Your complainants, however, are informed and believe, and therefore charge, that since the interval which has elapsed since said meeting the Attorney General of the United States has declined to advise the defendants touching the limitation of their powers and duties in the premises, and that it is the fixed intention and determination of the defendants to proceed with the assessment as aforesaid of each tract or parcel of land within the District of Columbia to the extent of such benefits as they shall deem the said real estate specially benefitted, and that it is their purpose, at the meeting to be held by them on the 19th day of January instant, to enter upon the assessment of the aforesaid land of your complainants and of others so as aforesaid surrounding or abutting upon said Rock Creek park, and to proceed with said assessment thereafter from time to time until the same shall be completed.

9 Fourteenth. Your complainants are advised and charge that upon a just interpretation of said act of Congress the threatened assessment, when confirmed, will "be made a lien on the real estate assessed; that said real estate will be liable to be sold upon default being made in any installment of such assessment;

that deeds made to purchasers at sale for such delinquent assessments will be *prima facie* evidence of the right of the purchaser and any one claiming under him that the real estate was subject to asse-sment and directly benefitted, and that the assessment was regularly made; that the assessment was not paid; that due advertisement had been made; that the grantee in the deed was the purchaser or assignee of the purchaser, and that the sale was conducted legally;" that "any judgment for the sale of any real estate for unpaid assessment shall be conclusive evidence of its regularity and validity in all collateral proceedings, except where the assessment was actually paid, and the judgment shall estop all persons from raising any objection thereto or to any sale or deed based thereon which existed at the date of its rendition and could have been presented as a defense to the application for such judgment;" that such assessment will be valid upon its face, and its invalidity could only be shown by evidence of facts extrinsic thereto, as—

a. That the defendants are *functi officiis* and no longer possess the power and authority to make such assessment.

b. That the time has long since elapsed when the said assessment could have been made legally in the manner and for the objects and purposes prescribed in and by said act.

c. That said assessment is not authorized at this time upon any just interpretation of the said sixth section or upon any rational construction of the entire act.

d. Because the moneys realizable upon said assessment are payable, under the act, directly to the Treasurer of the United States, who is required to keep the same as a separate fund to be paid out by him, on the order of the defendants, to any persons entitled thereto as compensation for land or services, and there are, in point of fact, no persons to whom such payments can be legally made at this time.

e. Because the occasion of making such assessment has been anticipated and made nugatory by the payment in full, as aforesaid, of all persons entitled to compensation for lands and services out of the $1,200,000 appropriated for the purpose by said act.

f. Because the proposed assessment can only result in the creation and accumulation of a fund which, if capable of being used at all, could only be used as a separate fund for the unlawful payment of persons already paid in full for their land and for their services.

g. Because the economic conditions which made the consequences, beneficial or otherwise, of the location and improvement of the Rock Creek park possible of ascertaining at the date contemplated by said act for the making of such assessment, to wit, at the date of its establishment, have ceased in the interval to exist or have become modified to such a degree as to afford no just or legal criteria for making such assessment.

10 *h.* Because, as your complainants are prepared to prove, no special benefits have, in fact, inured to the land, lots, and blocks, including the land of your complainants, situate in the District of Columbia by reason of the location of said park, and because, inasmuch as said park remains today in precisely the same

condition that it was in at the date of its location, nearly four years ago, no such benefits have resulted from its improvement, and your complainants beg leave to refer upon this point to the accompanying affidavits marked, respectively, "A" and "B."

i. Because the assessment authorized in and by the sixth section of the act is excessive, inequitable, and unjust in this, that the said section prescribed that if the proceeds of assessment exceed the cost of the park the excess shall be used in its improvement, and is insensible in that it provides, further, that such excess shall be so used, "under the direction of the officers named in section eight, if such excess shall not exceed the amount of ten thousand dollars," in this, that the act contains no such section as section eight, and therefore names no officers having authority to so use such excess, and is incapable of execution because it further provides that "if it shall exceed that amount that part above ten thousand dollars shall be refunded ratably" in this, that provision is thereby made for the excessive levy of said assessment over and above any possible legitimate object therefor and in violation of fundamental principles governing and controlling the exercise of the taxing power of the legislature.

j. Because the section is repugnant, irreconcilable, and incapable of enforcement because it provides in the first place for the assessment, exclusively, of "such proportion of such cost and expenses upon the lands, lots, and blocks situated in the District of Columbia specially benefitted by reason of the location and improvement of said park as nearly as may be in proportion to the benefits *resulting* to such real estate," and subsequently prescribes that "if the proceeds of assessment exceed the cost of the park the excess shall be used in its improvement * * * if such excess shall not exceed the amount of ten thousand dollars."

And that a cloud will be thereby cast upon your complainants' title to their aforesaid real estate, and they will be subjected to a multiplicity of suits in connection therewith, in consequence whereof and of the premises they will unavoidably suffer irreparable injury for which the strict course of the common law affords them no redress and for which they are remediless save by the intervention of a court of equity.

Fifteenth. Further complaining, your complainants say that they are advised and believe, and therefore charge, that the said act of Congress, in so far as and to the extent that it makes provision for and prescribes the assessment of such proportion of the cost and expense of the location and improvement of the said Rock Creek park upon the lands, lots, and blocks situated in the District of Columbia specially benefitted by reason of such location and improvement as the defendants shall deem the said real estate
11 specially benefitted, is repugnant to the Constitution of the United States, and therefore void, for the following, among other, reasons, to wit:

1. Because provision is thereby made for the levy of a direct tax in aid of an object avowedly national without regard to the rule of

apportionment prescribed in and by the second section of the first article of the Constitution.

2. Because if the object of the proposed assessment be not in truth general and of national use and enjoyment, as it is declared by said act to be, but, on the contrary, a matter of purely local concern and obligation, however unsolicited, the act is clearly unconstitutional, in that it appropriates the sum of $1,200,000 from the monies of all the people of the United States for a private use, benefit, and enjoyment of a relatively small proportion of the individual citizens thereof.

3. Because whether the Rock Creek park, the object of the proposed assessment, be regarded as a work of purely national character or as a local improvement only, the authority sought to be conferred by said act on the defendants to assess each tract or parcel of land specially benefitted to the extent of such benefits as they shall deem the said real estate specially benefitted is such attempted delegation of legislative authority as is incompatible with the implied limitation upon the powers of Congress in that behalf prescribed by section eight of article one of the Constitution.

4. Because it is thereby sought, arbitrarily and in the manifest absence of compensating benefits, to subject the property of comparatively few individuals, located within narrow territorial limits, to assessments alike for the cost and for the improvement of a tract of land which is legislatively declared to "be perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States."

5. Because constitutional limitations upon the powers of Congress, whether legislating in its national character or exclusively in the interests of the District of Columbia, are no less strictly defined by implication than they are by express inhibition, so that it is equally objectionable to visit upon the entire population of the United States the cost of a work of local and private concern to the people of the District of Columbia and to burden the people of the District of Columbia with the cost of a tract of land which has been perpetually dedicated and set apart as as public park or pleasure ground for the benefit and enjoyment of the people of the United States.

6. Because the assessment of your complainants' property as for benefits, which is threatened by the defendants in face of the generally admitted fact that no benefits have in fact inured to their said property by reason of the location and improvement of said Rock Creek park, must result in such property being taken for public use without just compensation and in derogation of constitutional guarantee.

7. Because the location and improvement of the Rock Creek park confers no benefit upon the real estate within the District of
12 Columbia over and above the general benefit conferred on the people at large of the United States.

Sixteenth. Your complainants are further informed and believe, and therefore charge the truth to be, that the defendants intend to include and have actually included within the area or district which they propose to assess as for benefits derived and derivable from the

location and alleged improvement of the said Rock Creek park and for the expenses incidental thereto all the land surrounding said park, including the aforesaid land of your complainants, and that, unless they shall be restrained by this honorable court from so doing, the said defendants, acting as the commission aforesaid, will proceed forthwith to levy such assessment upon the aforesaid land of your complainants.

Wherefore, the premises considered and forasmuch as your complainants are remediless as aforesaid at law and can only obtain relief by the preventive agency of a court of equity, your complainants humbly pray as follows:

1. That the said defendants, The Commission for Locating the Land for Rock Creek Park, may be enjoined and restrained by the order of this honorable court during the pendency of this suit and forever thereafter from making and levying an assessment for any proportion whatever of the cost and expenses of locating and improving the Rock Creek park upon the aforesaid land of your complainants.

2. That so much and such part of the aforesaid act of Congress as provides in and by the sixth section thereof for assessing a proportion of the cost and expenses of locating and improving the Rock Creek park upon the land, lots, and blocks situated in the District of Columbia as for special benefits by reason of the location and improvement of said park be declared to be repugnant to the Constitution of the United States, and therefore void.

That your complainants may have such other and further relief as their case may require.

May it please your honorable court to grant unto your complainants the writ of subpœna directed to the said Thomas Lincoln Casey, Chief of Engineers of the United States Army; Charles F. Powell, Engineer Commissioner of the District of Columbia; Henry V. Boynton, Samuel P. Langley, and R. Ross Perry, all residing in the District of Columbia aforesaid, commanding them to be and appear in this court at some certain day to be named therein and answer the premises and abide by and perform such decree as may be passed therein.

And, as in duty bound, your complainants will ever pray, etc.

MARY VAN RISWICK.
AVARILLA LAMBERT.
MARTINA CARR.

LAMBERT, LAMBERT & WILSON,
Solicitors for Compl'ts.

13 DISTRICT OF COLUMBIA, *To wit:*

We, Mary Van Riswick, Avarilla Lambert, and Martina Carr, on oath say that we have heard read the foregoing bill of complaint by us subscribed and know the contents thereof; that the facts therein stated of our personal knowledge are true, and the facts therein stated on the information of others we believe to be true.

MARY VAN RISWICK.
AVARILLA LAMBERT.
MARTINA CARR.

Subscribed and sworn to before me this seventeenth day of January, A. D. 1895.

[SEAL.] GEORGE C. AUKAM,
Notary Public, D. C.

EXHIBIT A.

Before Thomas Lincoln Casey, Chief of Engineers, United States Army; Charles F. Powell, Engineer Commissioner of the District of Columbia; Henry V. Boynton, Samuel P. Langley, and R. Ross Perry, Esquires, commissioners to select the land for Rock Creek park, convened for the purpose of assessing benefits under the act of Congress approved September twenty-seventh, 1890, entitled "An act authorizing the establishment of a public park in the District of Columbia."

Now come Avarilla Lambert and Martina Carr, who, as the sole surviving children and heirs-at-law of John Van Riswick, deceased, are seized in their demesne as of fee in equal undivided moi-ties of, in, and to the entire contents of parcel numbered thirteen (13) (amounting to about 12 acres) and to such residue (amounting to about 98 acres) of the contents of parcel numbered sixteen (16) on the recorded map of the Rock Creek park as remains after deducting from said parcel numbered sixteen (16) the donation of ten (10) acres, more or less, which was made by them to the United States for the purpose of said park heretofore, to wit, on the thirteenth day of July, 1892, and the additional quantity of fourteen (14) acres which were sold by them to the United States for the purposes of said park thereafterwards, to wit, on the twenty-fifth day of June, 1894, and not waiving any just rights of exception which they or either of them may have or be entitled at any time hereafter to urge to the jurisdiction of this honorable commission in the premises and to the regularity of its proposed proceeding, but hereby expressly reserving unto themselves all and singular such just rights by their counsel, Tallmadge A. Lambert, Esq., respectfully except to and protest against the assessment of their said lands for any proportion whatsoever of the cost of the land taken for and now constituting the said Rock Creek park or of the expenses of acquiring the same for the following, among other, reasons:

First. Because the values of the parcels of land included
14 within the recorded map of the Rock Creek park were duly found by the commission appointed for that purpose under and by virtue of the third section of said act of Congress, and were thereupon and to the extent of the lands selected by this honorable commission duly approved by the President of the United States, and the values so ascertained by the appraising commission and appraised by the President of the United States, being the cost of the land actually taken for said park, together with all and singular the expenses for acquiring the same, were then and there fully paid and satisfied, the former to the owners respectively of said several parcels of land and the latter to the several agents em-

ployed in the acquisition thereof, as will fully and at large appear, reference being had to the reports, audits, and vouchers of said payments respectively filed among the proceedings in cause No. 366 on the district court docket in the clerk's office of the supreme court of the District of Columbia, entitled "United States, upon petition, etc., *vs.* Glen W. Cooper *et al.*"

Second. Because no part whatsoever of the cost of the land taken for and now constituting the said Rock Creek park and no part whatsoever of the expenses of acquiring the said land remains at the present time unsatisfied and unpaid.

Third. Because of the aggregate sum of money which was appropriated by the Congress and named in said act, to wit, the sum of $1,200,000, such proportion as was necessary has been already expended, on the requisition and request of this honorable commission, for the cost of the land taken for and now constituting the said Rock Creek park and for the expenses of acquiring the said land, and the obligation of reimbursing the Treasury of the United States to the extent of one-half of the money so expended is imposed upon these protestants in common with all other tax payers within the District of Columbia by the sixth section of said act, so that to the full extent of one-half part of said expenditure the lands of these protestants and of all other tax-payers within said District are already burdened and taxed for the cost of the land taken for and now constituting the said Rock Creek park, including the expenses of acquiring the same, and it is respectfully submitted that any further taxation for this purpose, whatever may be the guise it shall assume and however its territorial operation may be limited, cannot fail to be duplicate, odious, and unjust.

Fourth. Because these protestants are advised that a fair interpretation of said act would seem to make clear the intention of its framers.

To secure the selection of a tract of land within certain designated boundaries, to "be perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States, to be known by the name of Rock Creek park," and to propose to this honorable commission the adoption of the following steps, in the strict order of succession, for its acquisition, as—

a. To provide for the purchase of such lands as might be bought.

15 *b.* To provide for the condemnation of such lands as could not be purchased and for the assessment of their values respectively.

c. To defray the cost of the land so condemned, including the expenses of acquiring the same, by assessing "such proportion of such cost and expenses upon the lands, lots, and blocks situated in the District of Columbia specially benefitted by reason of the location and improvement of said park, as nearly as may be, in proportion to the benefits resulting to such real estate."

d. To turn over the proceeds of such assessment to the Treasurer of the United States, to be by him kept as a separate fund and to

be disbursed by him on the order of this honorable commission "to any persons entitled thereto as compensation for land or services."

e. To supply any deficiency in said assessment when made, or if, for any reason, it should not have been made in its proper sequence, as actually happens, or at all, then, and in that event, "to pay the expenses of inquiry, survey, assessment, cost of lands taken, and all other necessary expenses incidental thereto" out of the sum of one million two hundred thousand dollars appropriated by said act for the purpose.

f. To provide that the public park authorized and established by said act should thereafter and permanently be under the joint control of the Commissioners of the District of Columbia and the Chief of Engineers of the United States Army.

Fifth. Because these protestants are further advised that upon a fair construction of said act the duties of your honorable commission in this behalf ceased *ipso jure* with the establishment of the park, and that the park was established when the cost and expenses thereof were fully paid and satisfied out of the moneys appropriated for the purpose by the said act of Congress. Wherefore these protestants respectfully submit that any assessments that might now be made by your honorable commission could not be otherwise than ineffectual.

Sixth. Because conceding, *argumenti gratia*, the existence of authority in this honorable commission to make the proposed assessment, these protestants respectfully submit that the period for making it as established by the said act, to wit, a period immediately subsequent to the final confirmation of the report of the appraising commission, has long since elapsed, and with it the contemporaneous conditions which were alone competent to determine the judgment of this honorable commission in making such assessments have ceased to exist.

Seventh. Because, again conceding, *argumenti gratia*, the right to assess at all, no special benefits have, in fact, inured to the lands, lots, and blocks situated in the District of Columbia by reason of the location of said park, and inasmuch as said park remains today in precisely the same condition in which it was at the date of its location, nearly four years ago, no such benefits have resulted from its improvement.

Eighth. Because the provisions of said act on the subject of assessment are hopelessly conflicting and insensible, and these
16 protestants submit that any attempt to enforce them must result in the imposition of an unjust, unnecessary, and duplicate burden upon the unbenefitted tax-payer.

Ninth. Because local assessment as for supposed benefits resulting from the purchase and improvement of pleasure grounds and parks avowedly for the use, enjoyment, and benefit of the public at large is wrong in principle, arbitrary in practice, and inequitable in application and is disavowed in effect by forty-six of the forty-nine cities of the United States possessing such public parks, in each of which resort has been had for their purchase and improvement to

general as opposed to special taxation, as appears from the replies received by this honorable commission to its circular letter on the subject bearing date the 28th day of September, 1894, and in this connection these protestants beg leave to call attention to the following extract from the answer made on behalf of the city of St. Louis:

"In former years, about thirty years ago, special taxing park districts were created by act of legislature or city ordinance, but later on abolished, and all parks are now maintained from the general fund of this municipality."

Wherefore, and forasmuch as these protestants do not wish to be understood as waiving any right which they or either of them may have to except to the further proceedings in this behalf of this honorable commission, these protestants, by Tallmadge A. Lambert, Esq., their counsel as aforesaid, crave leave of this honorable commission to file therewith the foregoing statement of exceptions to and protest against its further proceedings in the premises; and these protestants, as in duty bound, will ever pray, etc.

TALLMADGE A. LAMBERT,
Counsel for Avarilla Lambert and Martina Carr, Children and Sole Surviving Heirs-at-law of John Van Riswick, Deceased.

EXHIBITS "B" & "C."

In the Supreme Court of the District of Columbia.

MARY VAN RISWICK *et al.*
vs.
THOMAS LINCOLN CASEY *et al.* } No. —, Eq. Doc.

DISTRICT OF COLUMBIA, *To wit:*

I, William B. Gurley, on oath say that I am a resident of the District of Columbia and have resided therein for the past thirty years; that I am engaged in the business of real-estate and investment securities in the city of Washington and am well acquainted with the values of land in said District; that I know the location of the Rock Creek park and am acquainted with the lands adjacent thereto; that, whatever might have been the beneficial influence of the park upon adjacent and remote land within the District
17 of Columbia in favorable times and under favorable conditions, the financial depression and monetary stringency which has prevailed since the period of its establishment in 1893 have effectively neutralized and destroyed any such influence by depreciating the market for real estate generally throughout the District of Columbia. I do not, therefore, consider that any benefits whatever have thus far resulted to or can at this time be predicated of adjacent or other property within the District of Columbia by reason of the location of the Rock Creek park; and inasmuch as said park remains today in precisely the condition it was

in at the time of its location, no benefit whatever has resulted from its improvement.

WILLIAM B. GURLEY,
1335 *F St. N. W.*

Subscribed and sworn to before me this 17th day of Jan'y, A. D. 1895.

[SEAL.] FRANK WILSON BROWN,
Notary Public.

I have read the statement of W. B. Gurley and concur in the same.

CHAS. C. DUNCANSON.

Subscribed and sworn to before me this 19th day of January, A. D. 1895.

[SEAL.] W. P. YOUNG,
Notary Public.

In the Supreme Court of the District of Columbia.

MARY VAN RISWICK *et al.*
vs.
THOMAS LINCOLN CASEY *et al.* } No. —, Eq. Doc.

DISTRICT OF COLUMBIA, *To wit:*

We, whose names and occupations are hereunder written, being citizens of the United States and residents of the District of Columbia, on our respective oaths say that we have personal knowledge of the location and surroundings of the Rock Creek park and of the values of land generally within the District of Columbia; that we have read the annexed affidavit of William B. Gurley and fully agree with him in the opinion that no benefits whatever are now justly assessable upon or against land surrounding the Rock Creek park or upon or against land otherwise situated in the District of Columbia by reason of the location and establishment of said park, and that no such benefits are traceable to either description of land within the District of Columbia by reason of the improvement of said park for the sufficient reason that no improvement whatever has been made thereof since the time of its location and establishment as aforesaid.

DWIGHT ANDERSON,
Real Estate, 1008 *F St. N. W.*

18 DISTRICT OF COLUMBIA:

Subscribed and sworn to before me the 19th day of January, A. D. 1895.

[SEAL.] HENRY J. GROSS,
Notary Public.

Demurrer.

Filed February 5, 1895.

In the Supreme Court of the District of Columbia.

MARY VAN RISWICK *et al.*
vs.
THOMAS LINCOLN CASEY *et al.* } In Equity. No. 16171.

Demurrer.

These defendants, by protestation, not confessing all or any of the matters and things in said bill of complaint contained to be true in manner and form as the same are therein set forth, do demur thereto, and for cause of demurrer show that the said complainants have not in and by their said bill stated such a case as does or ought to entitled them to any relief in equity against these defendants.

Wherefore, and for divers other errors and imperfections, these defendants demand the judgment of this court whether they shall be compelled to make any further answer to the said bill or any of the matters or things therein contained, and pray to be hence dismissed at reasonable costs in this behalf sustained.

A. A. BIRNEY,
U. S. Att'y, D. C., Sol'r for Defendants.

Order Sustaining Demurrer, etc.

Filed February 18, 1895.

In the Supreme Court of the District of Columbia.

MARY VAN RISWICK *et al.*, Complainants,
vs.
THOMAS LINCOLN CASEY *et al.*, Defendants. } No. 16171, Equity Docket.

This cause coming on to be heard upon the demurrer of the defendants to the complainants' bill and having been argued by counsel and considered by the court, it is, this 18th day of February, 1895, adjudged, ordered, and decreed that the said demurrer be, and the same is hereby, sustained, with leave, however, to the complainants to renew their application at a later stage in the proceedings of the defendants as such commission by supple-
19 mental bill or other pleading as the complainants may be advised, for which purpose jurisdiction is retained by the court of the cause.

W. S. COX, *J.*

Supplemental Bill & Exhibit "A."

Filed February 27, 1895.

In the Supreme Court of the District of Columbia.

MARY VAN RISWICK, Widow, and AVARILLA LAMBERT (*née* Van Riswick) and Martina Carr (*née* Van Riswick), Children and Sole Heirs-at-law of John Van Riswick, Deceased,

vs.

THOMAS LINCOLN CASEY, Chief of Engineers of the United States Army; Charles F. Powell, Engineer Commissioner of the District of Columbia; Henry V. Boynton, Samuel P. Langley, and R. Ross Perry, Constituting and Composing the Commission to Select the Land for Rock Creek Park under and by Virtue of the Act of Congress Entitled "An Act Authorizing the Establishing of a Public Park in the District of Columbia," Approved September 27, 1890.

To the supreme court of the District of Columbia, holding a special term for the trial of equity causes:

The supplemental bill of complaint of the above-named complainants humbly shows that heretofore they filed their bill of complaint in this court against the above-named defendants, praying, among other things, that the said defendants might be enjoined and restrained from assessing the certain land of the complainants therein specifically mentioned as for alleged benefits resulting from the location and improvement of the Rock Creek park, as in said bill is particularly set forth; to which bill the defendants demurred generally, and such proceedings were thereupon had that the court sustained the said demurrer, with leave, however, to the complainants to renew their application for injunction at a later stage in the proceedings of the defendants as a commission for assessing benefits as aforesaid by supplemental bill or otherwise as they might be advised, for which purpose jurisdiction of the cause was then and there retained by the court, as by the same proceedings now in this court will appear.

And the complainants now further show unto this honorable court by this their supplemental bill of complaint (hereby renewing the allegations in said original bill and making the said original bill a part of this supplemental bill) that since the passage of the aforesaid order and decree in this cause the defendants have proceeded to assess the lands, lots, and blocks, being real estate within the District of Columbia, which they deem to be specially benefited by reason of the location and improvement of said Rock Creek park, pursuant to the advertisement in that behalf, which is mentioned in the bill of complaint, and to that end have con-
20 vened in public session from time to time and have solicited the attendance of divers persons whose opinions, not sanctioned by oath or affirmation, have been solicited on the subject of

the existence, extent, and value of such alleged benefits, and then and there have caused said opinions to be reduced to writing; (that of the persons whose opinions have thus far been given upon request as aforesaid of the said defendants, James A. Bates, Samuel T. G. Morsell, and J. Harrison Johnson, who constitute the existing board of assessors for the District of Columbia; Frederick L. Moore, who was a member of the last preceding board of assessors, and John F. Cook, the late collector for said District, have each declared, as the complainants are informed and believe, that no appreciable special benefits have resulted as yet to real estate lying within the District of Columbia by reason of the location and improvement of said park, and that the only views favorable to the existence of such benefits are such as have been expressed by Michael I. Weller, a real-estate agent doing business in the eastern section of the city of Washington, and William C. Dodge, who is engaged in business in said city as a patent attorney, neither of whom, as the complainants are further informed and believe, undertook to set a valuation upon such supposed benefits or exhibited a personal acquaintance with the topographical features of the lands surrounding the park or with the conditions determining the current market values of such lands; and complainants further show that notwithstanding said preponderance of opinions adverse to the existence of any special benefits to lands, lots, or blocks, being real estate within the District of Columbia, by reason of the location and improvement of said park) that the defendants (nevertheless), at the last preceding public session held heretofore, to wit, on the 21st day of February, 1895, formally announced that they deem certain property lying within a specified area, to wit, within the distance of one-fourth of a mile from the limits of said park, to be specially benefitted by reason of its location, and in particular then and there notified the complainants, by their solicitor, who was then and there in attendance, that they deem the parcel of land which is mentioned in the said bill of complaint as being the residu-m of parcel numbered sixteen (16) on the recorded map of the Rock Creek park whereof the complainants are seized and possessed in the manner in said bill set forth to be specially benefitted by reason of the location of said park, and that it is the fixed and determinate purpose and intention of the defendants to forthwith assess said parcel in the proportion and to the extent that they deem the same to be, as aforesaid, specially benefitted, and that the defendants then and there, in evidence of their aforesaid notification and declaration of intent to levy said assessment, caused a minute to be made thereof in writing, of which a duly certified copy is hereunto annexed, marked "Exhibit A," and is prayed to be taken as part hereof; and the complainants further show that the said defendants, unless they shall be restrained in the meantime by the order of this honorable court, will forthwith proceed to levy and collect the proposed assessment upon their aforesaid parcel
21 of land as for alleged benefits resulting thereto by reason of the location of said Rock Creek park, by reason whereof, since the complainants are wholly without remedy at law, the title to their said real estate will be inevitably clouded; they will suffer

irreparable injury in respect of their ownership of said parcel of land, and they will be subjected to a multiplicity of suits by reason of the levy and attempted enforcement of said assessment.

To the end, therefore, that the said defendants may answer as well the matters charged in the original bill of complaint as in this supplemental bill, and that the complainants may have such relief against them as is prayed by the original bill—

And, in particular, that the defendants may be restrained by order of this honorable court during the pendency of this suit and forever thereafter from levying and collecting the said assessment against the property of your complainants as for benefits alleged to have specially resulted to said property by reason of the location and improvement of the said Rock Creek park:

May it please this honorable court to grant unto the complainants the writ of subpœna against the said Thomas Lincoln Casey, the said Charles F. Powell, the said Henry V. Boynton, the said Samuel P. Langley, and the said R. Ross Perry, commanding them and each of them to appear in this court at some certain day to be therein named to answer the premises and to abide by and perform such decree as may be passed therein; and, as in duty bound, your complainants will ever pray, etc.

MARY VAN RISWICK.
AVARILLA LAMBERT.

TALLMADGE A. LAMBERT,
Sol'r & of Counsel.

DISTRICT OF COLUMBIA, *To wit:*

We, Mary Van Riswick, Avarilla Lambert, and Martina Carr, on oath say that we have heard read the foregoing supplemental bill of complaint by us subscribed and know the contents thereof; that the facts therein stated of our personal knowledge are true, and the facts therein stated on information of others we believe to be true.

MARY VAN RISWICK.
AVARILLA LAMBERT.

Subscribed and sworn to before me this 27th day of February, A. D. 1895, by Mary Van Riswick & Avarilla Lambert.

[SEAL.] RUTLEDGE WILSON,
Notary Public.

EXHIBIT "A."

The ACTING CHAIRMAN: Gentlemen, it seems to the commission that, in so far as any definite result can be arrived at from the testimony taken thus far, there are two points upon which the commission may announce that its judgment has been determined:

22 First. Save in exceptional cases, which the commission cannot consider at present, there have been no special benefits accruing by reason of the location and improvement of the park to any land within the District of Columbia situated more

than a quarter of a mile in any direction beyond the nearest park limits.

Second. That while the commission cannot undertake to say that all lands abutting upon the park boundaries and within a quarter of a mile of those boundaries in any direction have been specially benefited by the location and improvement of the park, yet it can undertake to say that, in its judgment, the testimony taken thus far establishes the fact that there have been certain properties which, by reason of their outlook upon the park, have been so specially benefited.

If the property-owners generally desire to be heard upon either of those points the commission would be glad to hear them now; if the property-owners do not desire to be so heard, then Mr. Lambert, as attorney for the owners of the Van Riswick tract, is notified that in the opinion of the commission there is one such point upon the tract numbered sixteen, where the old Fenwick house is on the knoll.

In the opinion of the commission that tract, at least in that particular point, has been benefited by the location of the park, not only because of its proximity thereto, but because of its overlook of the park.

This is a specific announcement of the intention of the commission to assess special benefits, the amount of which it cannot determine until Mr. Lambert shall have been heard upon that particular piece of property. The announcement is made at this time that he may secure a standing in court, that he may bring the matter to the attention of Mr. Justice Cox. It is also made to save time and money to everybody concerned. Unless the commission be restrained it will levy a tax upon that particular piece of property, although the commission is not prepared to say what will be the amount of that tax.

Mr. LAMBERT: As I understand, there is a fixed determination to make the levy without naming the amount.

The ACTING CHAIRMAN: Yes; and, if not restrained, the purpose of the commission would be to proceed from day to day to hear testimony with respect to particular tracts which it may think are benefited in order to ascertain the amount of benefit.

The commission is dealing with a most indefinite thing, a thing in regard to which it is difficult to get any fixed standard as a guide. The commission has, therefore, decided to bring this matter to a conclusion, make this determination upon the evidence heard so far, and then proceed specifically in reference to the other tracts.

Mr. JOHNSON: Gentlemen of the commission, I am not clear from what has been announced as the view of the commission whether it is its purpose hereafter to proceed simply upon the question of what particular tracts will be assessed and how much, or on the question whether a benefit has or has not attached, which is still open
23 for consideration, and, if that be the case, whether the commission has reached a conclusion about that and the burden is to be upon the property-owners to remove it.

The ACTING CHAIRMAN: It was intended to make that clear. The conclusion is that there are certain points of land within this zone of a quarter of a mile which, by reason of their outlook upon the park, have been specially benefited. The commission does not now undertake to say that it is its judgment that all land within that zone of a quarter of a mile have been specially benefited; but in order to reach any definite result the commission will take up definite tracts upon which it knows that there are physical situations of commanding outlook over the park and proceed to assess special benefits in respect to them.

Mr. JOHNSON: I do not wish to be contentious. I simply wish to understand the conclusion of the commission.

The ACTING CHAIRMAN: The commission would be glad to hear any suggestion you may have to make.

Mr. JOHNSON: The proceeding thus far has been in this way: that witnesses have been called here and asked their opinions, more or less, in reference to specific property, not generally. Will the commission announce without further testimony in reference to the tax against it that with respect to a specific piece of property the commission had come to the conclusion that it is a subject of taxation and invite testimony from the property-owners on the subject, or whether it will take up a specific piece of property with the view of inquiring whether it will assess a benefit or not and have evidence offered on that topic first? In other words, what I want to understand is whether what the commission has heard in the way of testimony has placed it in such a position that it is able to proceed and form conclusions of its own upon the question of benefits, leaving it for the owners to come in and meet that testimony.

The ACTING CHAIRMAN: The commission has formed a conclusion to this extent: That wherever upon tracts within the distance of which I spoke there are points commanding an outlook upon the park, those points have been specially benefited. The commission does not know exactly what those physical situations are, and will take testimony about it. *It does know about one for a special reason.*

Mr. JOHNSON: The commission has reached the conclusion upon what it has heard that situations within a quarter of a mile of the park have a special advantage in the way of outlook over the park and are subject to assessment.

The ACTING CHAIRMAN: For the present it has. There may be others, *but those are at least.*

Mr. JOHNSON: Those within a radius of a quarter of a mile of the park have that advantage and are subject to assessment.

The ACTING CHAIRMAN: Yes.

Mr. JOHNSON: I do not know that objections are necessary, and you understand that anything I may suggest is intended to secure proper method of proceeding here.

The ACTING CHAIRMAN: We understand that.

24 Mr. JOHNSON: Lest it may be necessary, I now want to object to the commission reaching any conclusion as to any area or as to any specific situation in any area without first hearing the evidence of the property-owners upon the specific question as to

whether or not there has any benefit attached to any property, and in that connection I want to say that I will be prepared to offer the evidence of a large number of owners of real estate, dealers and brokers upon that subject, and in order to thoroughly protect myself in the premises it is my purpose to make application to the court upon the lines I indicated at the outset for compulsory process to get the attendance of those persons, to have them sworn by the clerk, and take their testimony under oath. That is for the purpose of showing, as I believe I can, by an overwhelming amount of testimony of most reliable persons of this District, that the assumption that a financial benefit has attached to any property anywhere in this District by the establishment of that park is not justified by the facts.

The ACTING CHAIRMAN: The matter is open for such hearing as the law may give you. An opportunity will be afforded you for that hearing.

The immediate question is in regard to Mr. Lambert's tract. If Mr. Lambert expects any further hearing outside of what we have already announced before appealing to the court, it is open to him; but, as at present advised, that is the judgment of the commission.

Mr. LAMBERT: In regard to the judgment of the commission (the fairness of which I fully appreciate and assume it to be in the line of providing for itself an authority upon the subject) I should feel much freer and much more certain of satisfying the court of its jurisdiction, looking upon this as a desire to have a test case, if the commission would see fit to levy an assessment if it feel that it has reached the point where it can do so.

The ACTING CHAIRMAN: The commission cannot do that without sending witnesses out there to examine property definitely and taking their opinion as to the amount.

Mr. LAMBERT: Of course, I understand that any assessment you may make would depend——

The ACTING CHAIRMAN: This commission is composed of the Chief of Engineers of the U. S. Army, the secretary of the Smithsonian Institution, the Engineer Commissioner of the District of Columbia, of General Boynton, and myself. I do not think any one of those gentlemen has any more intuitive knowledge as to the value of this property than I have. I am perfectly ignorant and incompetent to act until enlightened by definite testimony.

Mr. LAMBERT: The only embarrassment I have is the one I have suggested, whether the intimation of the intentions of the commission to do this thing is sufficient to overcome the objection of the court.

The ACTING CHAIRMAN: If we could make it any more definite we would be very glad to do so, but we cannot levy the tax without hearing witnesses on the subject.

Mr. LAMBERT: I will immediately give the matter the best consideration I can and act upon it, but maybe I do not make myself understood. My position is that the commission advise itself upon this particular fact. For instance, you will take such testimony as you desire upon this particular tract and

form an estimate about the tax you will impose and impose it, unless you feel that you will have to postpone the assessment until you shall have examined all the tracts. You could go at once upon the consideration of this tract.

The commission adjourned until Monday, March 4, 1895, at 1 o'clock p. m.

I certify that the above is a true transcript of a part of the proceedings of the commission to select the land for Rock Creek park at their meeting on Thursday, February 21st, 1895.

R. ROSS PERRY,
Acting Commissioner.

WEDNESDAY, *February* 27, 1895.

Court meets pursuant to adjournment.

* * * * * * *

MARY VAN RISWICK *et al.*
vs.
T. L. CASEY *et al.*
} 16171, Equity Docket 38.

The defendant is hereby restrained as prayed in the within-mentioned bill until further order, to be made, if at all, after a hearing, which is fixed for the 4th day of March, 1895, of which take notice.

By the court:

W. S. COX, *Justice.*

Order Granting Motion for Injunction.

Filed March 12, 1895.

In the Supreme Court of the District of Columbia.

MARY VAN RISWICK *et al.*
vs.
THOMAS LINCOLN CASEY *et al.*
} In Equity. No. 16171, Docket 38.

This cause coming on to be heard upon complainants' motion for injunction *pendente lite*, as prayed for in and by their supplemental bill of complaint, and being argued by counsel and duly considered by the court, it is thereupon, upon consideration thereof by the court, this twelfth day of March, A. D. 1895, ordered, adjudged, and decreed that the said motion be, and the same is hereby, allowed, and that the defendants be, and they are hereby, restrained and enjoined during the pendency of these proceedings from levying an assessment as for benefits upon the lands of complainants mentioned and described in the original bill of complaint.

W. S. COX, *J.*

26 *Amendment of Supplemental Bill.*

Filed March 16, 1895.

In the Supreme Court of the District of Columbia.

MARY VAN RISWICK *et al.*, Complainants, *vs.* THOMAS LINCOLN CASEY *et al.*, Defendants. } No. 16171, Eq. Doc. 37.

And now come the complainants, by Tallmadge A. Lambert, Esq., their solicitor, and before copy taken of their original and supplemental bills of complaint or either of them, and before answer or other pleading filed to said supplemental bill of complaint, amend their said supplemental bill of complaint in manner and form following, to wit, by striking therefrom all and singular the words intervening between the words "reduced to writing," at the eighteenth line from the top of the second page, and the words "the defendants," at the fourteenth line from the top of the third page thereof; also by inserting the word "that" before the last-mentioned words at the said fourteenth line from the top of the third page thereof, and by eliding the word "nevertheless" immediately after the said words, "the defendants," at the fourteenth line from the top of the third page thereof.

TALLMADGE A. LAMBERT,
Solicitor for Complainants.

Opinion and Decision on Motion of Injunction.

Filed April 16, 1895.

In the Supreme Court of the District of Columbia.

VAN RISWICK *et al.* *vs.* THE ROCK CREEK PARK COMMISSION. } In Equity. No. 16171.

Opinion by Mr. Justice Cox.

WASHINGTON, D. C., *April 2nd*, 1895.

The bill in this cause was filed to obtain an injunction against the assessment of benefits upon the property of the complainants by the commissioners appointed under an act entitled "An act authorizing the establishing of a public park in the District of Columbia."

When the original bill was filed it seemed to me to be premature and I denied the relief, without prejudice. Subsequently a supplemental bill was filed in which the following proceedings are shown to have taken place before the commissioners:

27 "The ACTING CHAIRMAN: Gentlemen, it seems to the commission that, in so far as any definite result can be arrived at from the testimony taken thus far, there are two points upon which the commission may announce that its judgment has been determined:

1st. Save in exceptional cases which the commission cannot consider at present, there have been no special benefits accruing by reason of the location and improvement of the park to any land within the District of Columbia situated more than a quarter of a mile in any direction beyond the nearest park limits.

2nd. That while the commission cannot undertake to say that all lands abutting upon the park boundaries and within a quarter of a mile of those boundaries in any direction have been specially benefitted by the location and improvement of the park, yet it can undertake to say that in its judgment the testimony taken thus far establishes the fact that there have been certain properties which, by reason of their outlook upon the park, have been so specially benefitted.

If the property-owners generally desire to be heard upon either of these points, the commission would be glad to hear them now; if the property-owners do not desire to be so heard, them Mr. Lambert, as attorney for the owners of the Van Riswick tract, is notified that in the opinion of the commissioners there is one such point upon the tract numbered sixteen, where the old Fenwick house is on the knoll.

In the opinion of the commission that tract, at least in that particular point, has been benefitted by the location of the park, not only because of its proximity thereto, but because of its overlook of the park.

This is a specific announcement of the intention of the commission to assess special benefits (the amount of which it cannot determine until Mr. Lambert shall have been heard) upon that particular piece of property. The announcement is made at this time that he may secure a standing in court, that he may bring the matter to the attention of Mr. Justice Cox. It is also made to save time and money to everybody concerned. Unless the commission be restrained, it will levy a tax upon that particular piece of property, although the commission is not prepared to say what will be the amount of that tax.

Mr. LAMBERT: As I understand, there is a fixed determination to make the levy without naming the amount?

The ACTING CHAIRMAN: Yes."

The authority of the commission to levy benefit assessments is derived from the sixth section of the act of Congress aforesaid, which contains two clauses, the differences between which are to be noted. The first clause is:

"That the commission, having ascertained the cost of the land, including expenses, shall assess such proportion of such cost and expenses upon the lands, lots, and blocks situated in the District of

Columbia especially benefitted by reason of the location and
28 improvement of said park, as nearly as may be, in proportion to the benefits resulting to such real estate.

The second clause is:

"If said commission shall find that the real estate in said District directly benefitted by reason of the location of the park is not benefitted to the full extent of the estimated cost and expenses, then they shall assess each tract or parcel of land specially benefitted to the extent of such benefits as they shall deem the said real estate specially benefitted."

It will be observed that the second clause provides for the contingency that real estate in the District of Columbia is not benefitted to the full extent of the estimated cost and expenses, and it might hence be inferred that the first clause was intended to provide for the contingency that the benefits did extend to the whole amount of the cost and expenses, and that the first clause intended to direct the whole of that cost to be assessed upon the several tracts, lots, or blocks of land situated in the District of Columbia in proportion to the benefits resulting to them respectively.

But the language of the first clause is absolute and unconditional. "The commission *shall assess*" is the language. The question is, What shall they assess? Can it mean that they shall assess the whole cost, apportioning it among the several tracts with reference to their *relative* benefits and without reference to their *actual* benefits? If so, it would, in the first place, be plainly unconstitutional, because it would make the several tracts pay for benefits they never received, and, in the next place, it would be in conflict with the second clause, which limits the assessments to the extent of the actual special benefit. Can the first clause mean that there shall be assessed upon the several tracts just such proportion *or portion* of the entire cost as the actual pecuniary benefit to them will amount to? If so, what was the use of the second clause, for that is just what that was intended to express. But even here, again, there would be a contradiction between the first and second clauses, for the one directs the assessment to be made with reference to the *location and improvement* of the park, and the other with reference to the *location* only. We must assume that Congress did not intend to direct the same thing to be assessed by two different clauses, and still less to direct it to be done in two different ways.

Bearing this in mind, when we examine the first clause we find that it has an uncompleted direction making it entirely meaningless. It directs, not that the whole cost shall be assessed, but that "*such proportion*" of cost and expenses shall be assessed. What that proportion is is not stated. Instead of saying "such proportion as may be determined by the commission," or as may be determined by one or other of certain considerations the sentence is left incomplete, and directs simply the assessment of "such proportion" without in any other way defining the proportion. If the court were asked to direct the commissioners by mandamus to discharge
the duty devolved upon them by this clause, what direction
29 could the court give? What proportion could it direct the

commissioners to assess upon the property? It seems evident that the clause is too uncertain to be executed, either voluntarily by the commission or under compulsion from the court, and they must be held to derive no authority to act under that clause.

There is a further difference to be noted between the two clauses. The assessment under the first clause was to be made with reference to the benefits resulting from both the *location and improvement.* In the second clause each tract is to be assessed to the extent of the benefits derived only from the *location* of the park. At the present time it is quite plain that no benefits are derived from the location, because the adjacent owners of property have nothing which they had not before. For this reason it appears that the commission have declared their intention of assessing with reference to both location and improvement. Their whole authority is derived under this second clause, and that does not authorize them to assess with reference to both *location and improvement*, and so far their proposed assessment is therefore without authority of law.

But if it could be held to authorize such proposed assessment, the standard by which they are to be guided is so uncertain as to make the execution of the law as impossible under this as under the former clause. When a street is by municipal ordinance directed to be opened, graded, paved, or otherwise improved, we all know exactly what is to be done and what the effect will be upon adjacent property; but there is no law providing for the improvement of the park. No system of improvement has been adopted; no money has been appropriated for the purpose of making improvements, and no one knows that any ever will be appropriated. The only standard which the commissioners would have for estimating benefits with reference to improvements would be found in their imagination as to what may be done at some indefinite time in the future. It is impossible that a just appraisement of benefits could be made on that basis. Here, also, if the court were to attempt to enforce the duty charged upon the commissioners, it would find it equally impossible with such proceeding under the first clause, as already suggested.

I think, therefore, that the assessment proposed to be made by the commissioners is not authorized by the statute, and as it would create a charge upon the record on the property of the complainants it ought to be enjoined, the question as to the jurisdiction of the court in that respect having been waived in the argument for the purpose of bringing before the court the naked question of the authority of the commissioners.

Again, it seems to me that the assessment of values and the assessment of benefits were intended to be parts of one and the same transaction; that the assessment of benefits was to immediately follow the ascertainment of the cost of the land and the expenses. The language of the second clause is, not that after the land shall have been paid for the assessment shall take place, but that the commissioners, *having ascertained the cost, shall assess*, &c.

In the second clause they are to ascertain whether the property is or is not benefitted, and, if so, whether it is benefitted

to the extent of the *estimated cost and expenses*. This language shows that the assessment of benefits was to take place immediately after the ascertainment of the cost or the estimated cost, and was not to be postponed until after payment for the land.

Another evidence of that is found in a later clause, which directs that the money collected under these assessments shall be paid to any persons entitled thereto as compensation for land or services. Here follow certain incongruities in the law. The assessment, it is said, shall be divided into four equal installments and may be paid by any party interested in full, or in one, two, three, and four years, with six per cent. interest. All payments are to be made to the Treasurer of the United States, who shall keep the account as a separate fund. In case the assessments are not paid, they were to be collected by the collector of the District in the same manner as delinquent taxes due to the District of Columbia, and although the assessments and the taxes might thus be postponed, the proceeds were directed to be paid for the land or services, whereas it is plain to any one's common sense that the holders of the land could not be postponed until such collection in the payment for their lands, but were entitled to be paid in cash.

But it is also provided that any party so interested might pay in full, and in such case it is obvious that the money so received was primarily applicable to the payment for the land. The appropriation from the Treasury of the United States is of $1,200,000, *or so much thereof as may be necessary*, and this appropriation is made "out of any money in the Treasury not otherwise appropriated." The act then appropriates two distinct funds to the payment for these lands—first, what should be collected from assessments, and, next, from the general unappropriated money in the Treasury. These two features of the law can only be reconciled by assuming that the proceeds of the assessments, so far as they would go, were to be applied first, and only so much as it might be necessary, in addition thereto, out of the general funds in the Treasury.

All this strongly implies that the assessments should be made immediately after the valuation, in order to ascertain how much should be paid from the Treasury at large, the assessments being directed to be kept by the Treasurer as a separate fund to be applied to this object. It was therefore evidently not intended that the money should first be paid out of the Treasury of the United States and then afterwards they should make the assessments. Particularly cannot that be the case under existing circumstances. The law requires that the District of Columbia should reimburse the Treasury of the United States one-half of the amount paid out of the Treasury in four equal annual instalments. That reimbursement, so far as the time which has since elapsed has allowed, it is understood, has been made by the District. If the assessments for benefits can be made now, it is the duty of the party assessed to pay the whole amount into the Treasury of the United States,
31 and the effect will be that as to one-half of the amount the Government will be paid twice—that is, it has already received payment from the District of Columbia, and would receive

payment again from the parties assessed. The commission has no authority to apportion this assessment between the District and the Government.

It may be that Congress by additional legislation might, if there were no constitutional objection, still direct these assessments to be made and apportioned between the United States and the District of Columbia, but under the existing law it could not be made at this late date without involving the parties assessed in this obligation to pay to the United States what they have already received.

The commissioners, as I understand, drew orders upon the Treasury in favor of the parties entitled to compensation for their lands, and they were paid by the Treasury on those orders as vouchers. The law really only authorized the commissioners to draw upon the money collected from assessments. Perhaps by fair implication they were authorized also to draw so much as the assessments failed to satisfy of the demands of the land-owners, but the effect of their drawing upon the Treasury for the whole amount due for the land was a virtual ascertainment by them that there were no benefits to be assessed, because they had no authority otherwise to draw upon the Treasury for the whole compensation due to the owners.

In addition to these considerations, I have considerable doubt whether this law is strictly constitutional. I do not mean to say that it is in conflict with any direct prohibition of the Constitution, but that it is probably foreign to the spirit of that instrument. There are instances in which the fundamental principles of our Government are offended by legislation where no express prohibition is found. For example, the Supreme Court have held that a State has no right to take private property for the use of other private persons instead of for public use. The same would doubtless be held to be contrary to the Constitution of the United States if attempted under congressional legislation. When a street is opened in a city under a municipal authority it is often done for the express purpose of benefiting the property through which it is opened as well as the public, and the benefits to the property abutting upon it are so manifest that no one denies the right to assess the abutting property-owners for those special benefits. They acquire an easement in the new street over and above that which the public has. They have a right to build and sell with reference to it, and it can never be afterwards closed up as against them, while it may be as against the public. The same may be said of a park in the city. The owners fronting upon it immediately acquire the ben-fit of light, air, prospect, and, in a certain sense, privacy also, in the shape of immunity from the prying eyes of opposite neighbors, of which privileges they cannot be deprived. But here is a park established in the cou-try, not at the instance or request of adjacent proprietors, not for their benefit, but declared to be a public park, a pleasure ground for the benefit and enjoyment of the people of the United States, and in which the adja-
32 cent owners acquire no easement different from that of the public. Where a great improvement is made for the benefit

of the public it does sometimes happen that a fractional part of that public *are* so far benefitted that it is proper to apportion a larger part of the burden to them, as, for example, where a court-house is located in a country town. While the expense is chargeable to the county at large, it has sometimes been properly held that an exceptional proportion of it might be charged upon the town. So in the case of The County of Mobile *vs.* Kimball, 102d U. S., 691, it was held that the cost of improving the harbor of Mobile, while chargeable to the whole county, might be specially charged against the city of Mobile; and in this same sense the District of Columbia is charged with one-half of the cost of this improvement, though it is declared to be for the use of the people of the United States; but in this case it is only the smaller part of the entire public benefitted who are supposed to be exceptionally benefitted and who are expected to bear the larger proportion of the burden of the entire public.

But when it comes to assessing individuals for public improvements, the question seems to be different. Suppose, for example, a court-house or a public monument or post-office should be erected in a town and the private property of individuals adjacent to it should be specially taxed for the supposed greater convenience which they enjoy of access to the court-house or post-office, or the privilege of gazing upon the public monument, it would at once be seen that great injustice had been done. It does seem to me that this would be a system of taxation which would not conform to the spirit of our Constitution. It might as well have been held proper to assess the buildings opposite to this court-house for the pleasure of gazing upon the Lincoln monument, if that monument had been erected by public authority.

There are several cases the opinions of which embody my ideas on this subject, to which I will refer without specially quoting from them. (54th Missouri, 457; 65th Pennsylvania State, 146; 69th Pennsylvania State, 352; 102nd U. S., 691.)

Upon these grounds I think the injunction should be granted.

W. S. COX, *J.*

Motion to Substitute William P. Craighill for Thomas L. Casey.

Filed May 16, 1895.

In the Supreme Court of the District of Columbia.

MARY VAN RISWICK *et al.*
vs.
THOMAS L. CASEY *et al.* } In Equity. No. —.

Now come the complainants, by their attorney and counsel, and suggest the retirement of the defendant Thomas L. Casey from active service in the Army of the United States and the appointment of William P. Craighill, as Chief of Engineers of the
33 United States Army, in the place and stead of the said Thomas L. Casey, retired as aforesaid, and move the court to

substitute the said William P. Craighill for the said Thomas L. Casey as a party defendant to this cause.

TALLMADGE A. LAMBERT,
Of Counsel of Compl'ts.

Order Substituting William P. Craighill for Thomas L. Casey.

Filed May 16, 1895.

In the Supreme Court of the District of Columbia.

MARY VAN RISWICK *et al.* *vs.* THOMAS L. CASEY *et al.* } In Equity. No. 16171, Doc. 38.

Upon the suggestion and motion of the complainants, it is by the court, this sixteenth day of May, 1895, ordered that William P. Craighill, Chief of Engineers of the United States Army, be, and he hereby is, substituted for Thomas L. Casey, retired, as a party defendant to this cause.

W. S. COX, *J.*

Answer of Defendants.

Filed July 24, 1895.

In the Supreme Court of the District of Columbia.

MARY VAN RISWICK *et al.*, Complainants, *vs.* WILLIAM P. CRAIGHILL, Chief of Engineers of the United States Army (by Substitution in the Place and Stead of Thomas Lincoln Casey, Late Chief of Engineers of the said Army, an Original Defendant Herein); Charles F. Powell, Engineer Commissioner of the District of Columbia; Henry V. Boynton, Samuel P. Langley, and R. Ross Perry, Constituting the Commission Created under the Act of Congress Approved September 27, 1890, Entitled "An Act Authorizing the Establishment of a Public Park in the District of Columbia." } In Equity. No. 16171, Docket 38.

The answer of the above-named defendants to parts of the supplemental bill of complaint (as amended) in the above cause and their demurrer to the residue thereof.

The said defendants, answering so much and such parts of the said amended supplemental bill and of the original bill of
34 complaint (which has been made part of said supplemental

bill) as they are advised it is material or necessary to make answer unto, say:

1. They admit the averments of the first paragraph.

2. They admit the averments of the second paragraph of the original bill, with this qualification, that since the filing of said supplemental bill Thomas Lincoln Casey, Chief of Engineers of the United States Army, one of the defendants named in said original bill and who was *ex officio* a member of the commission created by said act of Congress, has been succeeded as such Chief of Engineers by William P. Craighill, and that he, the said William P. Craighill, thereupon became *ex officio* a member of said commission, and that as such he has been made defendant in these proceedings in the place and stead of the said Thomas Lincoln Casey by order of the court heretofore passed therein.

3. They believe the portions of said act of Congress of September 27, 1890, referred to in the third paragraph of the original bill are correctly set forth in said paragraph, but for greater certainty in the premises refer to the act itself.

4. They admit the averments of the fourth paragraph of the original bill.

5. They admit the averments of the fifth paragraph of the original bill.

6. In answer to the averments of the sixth paragraph of the original bill, they say that title in fee simple to several of the tracts shown on said map was acquired by the United States under the said act of Congress through agreement with the owners of the same as to the purchase-money, the payment thereof to the respective owners of said tracts and conveyances of the said tracts by said owners to the United States, and that the proceedings had in this court upon the petition of the commission related only to the remainder of the tracts shown on the said map, and which could not be acquired by agreement with the respective owners thereof; and, further answering said paragraph, they say that, by reason of the fact that the sums so paid out as aforesaid and the aggregate of the values returned by the commissioners appointed by the court to appraise exceeded the amount of the appropriation made by said act for the acquisition of lands for said park, it became necessary to exclude from the limits of the park so defined by said map several of the tracts appraised in order that the cost of the land to be taken for said park should be brought within the said appropriation; that no new or formal modified map was made or caused to be made by the park commission showing the diminished area of said park, and that the recorded map, as modified by the exclusion of said tracts, still constitutes the map of the said park. These defendants believe that otherwise the averments of said paragraph are substantially correct, yet, as they are matter of record in the said proceeding, they refer to the same for greater certainty in the premises.

7. They admit the averments of the seventh paragraph of the original bill.

35 *8.* They admit the averments of the eighth paragraph of the original bill.

9. They admit the averments of the ninth paragraph of the original bill.

10. They admit the final and definite establishment of the park, as averred in paragraph 10 of the original bill, and that the same has passed under the permanent and joint control of the Commissioners of the District of Columbia and the Chief of Engineers of the Army, as provided by said act of Congress, but they deny that thereby the power and authority conferred upon these defendants by said act of Congress to make assessments for special benefits has been in any manner impaired.

13. They admit the averments of the thirteenth paragraph of the original bill.

14. They deny so much of paragraph fourteen of the original bill as avers, directly or indirectly, that these defendants are *functus officiis*, and that they no longer have the power to make assessments for special benefits, as contemplated by said act, and that no just or legal *criteria* now exists for the making of such assessments, and that no special benefits have in fact inured to the said land of complainants or any other land in the District of Columbia by reason of the establishment of said park.

15. They deny so much of paragraph fifteen of the original bill as avers, directly or indirectly, that it is a "generally admitted fact" that no benefits have inured to the said property of the said complainants by reason of the location and improvement of the said park, and that no special benefits have inured to any real estate in the District of Columbia by reason thereof.

16. Answering the sixteenth paragraph of the original bill, they say that, in so far as they have proceeded in the performance of their duty under said act of Congress with respect to the matter of assessments for special benefits, their conclusions are set forth in the extract from the minutes of their proceedings, marked Exhibit "A" to complainants' supplemental bill, which extract they pray may be read and considered as a part of this their answer. They deny that they have made any assessments or taken any further step in the direction of making such assessments than as indicated in said extract.

And, further answering, these defendants say that they admit the fact to be as averred in said supplemental bill, that the court did sustain the demurrer interposed to the original bill, with leave to the complainants to renew their applications for an injunction at a later stage in the proceedings of these defendants in the performance of the duty enjoined upon them by said act of Congress, of ascertaining what real estate has been specially benefited in the premises and of assessing such benefits thereon, and they admit that having ascertained the cost of the land taken for said park, including expenses, they have, in the performance of their said duty and with a view to the assessment of such special benefits in accordance with the requirements of said act of Congress, taken the further steps set

forth in said supplemental bill, and that in the performance
36 of the said duty and in the exercise of the power conferred upon them by said act of Congress they did find and determine that no land within the District of Columbia situated more than one-quarter of a mile in any direction beyond the nearest park limit had been specially benefited by reason of the location and improvement of the park, and that they did further find and determine that a portion of said tract sixteen (16) had been so benefited by the location and improvement of the park, not only by reason of its proximity thereto, but because of its overlook of the said park; and they admit that said Exhibit "A" to said supplemental bill is a correct extract from the minutes of the proceedings of these defendants; and they further admit that unless finally restrained by the order and decree of this honorable court they will further proceed in ascertaining and determining what lands within the said quarter-mile limit have been so specially benefited and make assessments thereon agreeably to the said act of Congress.

And these defendants say that to paragraphs eleven and twelve of the original bill, and to so much of paragraphs fourteen and fifteen thereof as is not above answered, and to such portions generally of the said supplemental bill and original bill as are not above answered, they do demur, and for cause of demurrer show that the complainants have not in and by the same made or stated such a case as entitles them to any relief in a court of equity; and these defendants pray the judgment of the court as to such parts of the bill as they have so demurred to as aforesaid, and whether they shall be compelled to make any other or further answer thereto.

A. A. BIRNEY,
Attorney of the United States in and for the District of Columbia, Solicitor for the said Defendants.

Affidavit and certificate waived.

TALLMADGE A. LAMBERT,
Solicitor for Complainants.

Replication.

Filed July 24, 1895.

In the Supreme Court of the District of Columbia.

MARY VAN RISWICK *et al.*, Complainants, *vs.* WILLIAM P. CRAIGHILL, Chief of Engineers of the United States Army (by Substitution for Thomas Lincoln Casey, Retired), *et al.*, Defendants.	No. 16171, Eq. Doc. 38.

The complainants join issue upon the defendants' answer.

TALLMADGE A. LAMBERT,
Sol'r and Counsel for Compl'ts.

37 *Precipe for Hearing.*

Filed July 24, 1895.

In the Supreme Court of the District of Columbia.

MARY VAN RISWICK *et al.*, Complainants, *vs.* WILLIAM P. CRAIGHILL, Chief of Engineers of the United States Army (by Substitution for Thomas Lincoln Casey), *et al.*, Defendants.	No. 16171, Eq. Doc. 38.

The clerk will set this cause for hearing upon the original and supplemental bills of complaint, the answer (coupled with demurrer) thereto, and replication.

TALLMADGE A. LAMBERT,
Sol'r and Counsel for Compl'ts.

JULY 19, 1895.

To the clerk:

I consent to the hearing as above directed.

A. A. BIRNEY,
Attorney of the United States and for the District of Columbia, Solicitor for Defendants.

Final Decree Granting Injunction.

Filed September 30, 1895.

In the Supreme Court of the District of Columbia.

MARY VAN RISWICK *et al.*, Complainants, *vs.* WILLIAM P. CRAIGHILL, Chief of Engineers of the United States Army (by Substitution for Thomas Lincoln Casey, Retired), *et al.*, Defendants.	16171, Eq. Doc. 38.

This cause being submitted by consent and without argument upon the original and supplemental bills of complaint, the answer (coupled with demurrer) thereto, and replication, and being duly considered by the court, and it appearing to the court that for the reasons stated in the opinion heretofore filed in this cause the complainants are entitled to the relief which they pray in and by
38 their original and supplemental bills of complaint, it is thereupon, upon consideration thereof, by the court, this thirtieth day of September, 1895, ordered, adjudged, and decreed that the de-

murrer in part to the original and supplemental bills of complaint be, and the same is hereby, overruled; and it is further ordered, adjudged, and decreed that the restraining order heretofore allowed and passed in this cause be, and the same is hereby, made perpetual, and that the defendants be, and they are hereby, perpetually enjoined, prohibited, and restrained from assessing the land of the complainants in the manner and form and for the object and purpose set forth and complained of in and by their said original and supplemental bills of complaint or in any manner or for any purpose whatsoever.

From this decree the defendants pray an appeal to the Court of Appeals of the District of Columbia, and the same is allowed.

W. S. COX, *J.*

Waiver of Citation and Bond of Appeal.

Filed October 12, 1895.

In the Supreme Court of the District of Columbia.

MARY VAN RISWICK *et al.*
vs.
WILLIAM P. CRAIGHILL *et al.*, Rock Creek Park Commission. } In Equity. No. 16171.

On behalf of the complainants, the filing of any bond on the appeal of the defendants from the decree of the special term of the supreme court of the District of Columbia is hereby waived and the service of citation is also waived.

TALLAMDGE A. LAMBERT,
Sol'r for Compl'ts.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 69, inclusive, to be true copies of originals in cause No. 16171, in equity, wherein Mary Van Riswick, Avarilla Lambert, and Martina Carr, children and sole heirs-at-law of John Van Riswick, deceased, are complainants, and Thomas Lincoln Casey, Charles F. Powell, Henry V. Boynton, Samuel P. Langley, and R. Ross Perry, constituting and composing the commission to select the land for Rock Creek park, are defendants, as the same remain upon the files and records of said court.

39 In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 18th day of October, A. D. 1895.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 521. William P. Craighill, Charles F. Powell, Henry V. Boynton, Samuel P. Langley, and R. Ross Perry, constituting and composing the commission to select the land for Rock Creek park, appellants, *vs.* Mary Van Riswick, widow, Avarilla Lambert and Martina Carr, children and sole heirs-at-law of John Van Riswick, deceased. Court of Appeals, District of Columbia. Filed Nov. 13, 1895. Robert Willett, clerk.

40 MONDAY, *February 3rd, A. D.* 1896.

WILLIAM P. CRAIGHILL, CHARLES F. POWELL, HENRY V. Boynton, Samuel P. Langley, and R. Ross Perry, Constituting and Composing the Commission to Select the Land for Rock Creek Park, Appellants,
vs.
MARY VAN RISWICK, Widow; AVARILLA LAMBERT and Martina Carr, Children and Sole Heirs-at-law of John Van Riswick, Deceased. } No. 521.

Upon motion of counsel for the respective parties, the above-entitled cause is assigned for hearing on Monday, February 17th, A. D. 1896.

MONDAY, *February 17th, A. D.* 1896.

WILLIAM P. CRAIGHILL, CHARLES F. POWELL, HENRY V. Boynton, Samuel P. Langley, and R. Ross Perry, Constituting and Composing the Commission to Select the Land for Rock Creek Park, Appellants,
vs.
MARY VAN RISWICK, Widow; AVARILLA LAMBERT and Martina Carr, Children and Sole Heirs-at-law of John Van Riswick, Deceased. } No. 521.

The argument in the above-entitled cause was commenced by Mr. H. T. Taggart, attorney for the appellants, and was continued by Messrs. W. J. Lambert and T. A. Lambert, attorneys for the appellees.

41 TUESDAY, *February 18th, A. D.* 1896.

WILLIAM P. CRAIGHILL, CHARLES F. POWELL, HENRY V. Boynton, Samuel P. Langley, and R. Ross Perry, Constituting and Composing the Commission to Select the Land for Rock Creek Park, Appellants,
vs.
MARY VAN RISWICK, Widow; AVARILLA LAMBERT and Martina Carr, Children and Sole Heirs-at-law of John Van Riswick, Deceased.
} No. 521.

The argument in the above-entitled cause was continued by Mr. T. A. Lambert, attorney for the appellees, and was concluded by Mr. H. T. Taggart, attorney for the appellants.

42 WILLIAM P. CRAIGHILL *et al.*, Appellants,
vs.
MARY VAN RISWICK, Widow, *et al.*
} No. 521.

Opinion.

Mr. Justice MORRIS delivered the opinion of the court:

This — an appeal from a decree in equity of the supreme court of the District of Columbia awarding an injunction against the Rock Creek Park Commissioners to restrain them from levying an assessment on certain lands of the appellees adjoining the park for supposed benefits accruing to the lands from the location of the park.

By an act approved February 27, 1890 (26 Stat. 492), Congress provided for the acquisition by the United States of a certain tract or tracts of land, within certain specified limits, extending along both sides of Rock creek, in the District of Columbia, to be "perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States, to be known by the name of Rock Creek park," with the proviso that the whole tract to be acquired should not exceed 2,000 acres, nor the total cost thereof the sum of $1,200,000, which sum was appropriated by the act to be used in payment for the land and for the incidental expenses of its acquisition.

Provision was made in the act for the appointment of the Engineer-in-chief of the Army, the Engineer Commissioner of the District of Columbia, and three citizens to be appointed by the President of the United States, as a commission to locate the park; to prepare an accurate map thereof, which should show the location, quantity, and character of each parcel of private property that might be required, with the names of the respective owners inscribed thereon; to cause such map to be recorded among the public records of the District of Columbia; and thereafter to conduct the proceedings for the acquisition of the land, which was to be secured either by purchase or by condemnation. It was provided farther that, upon the recording of the map, the several tracts of land therein embraced should "be held as condemned for public uses, and the title thereof

vested in the United States, subject to the payment of just compensation, to be determined by said commission and approved by the President of the United States;" and also that, if the commission should be unable to reach an agreement with the respective owners "to purchase all of the land so selected within thirty days after such condemnation at the price approved by the President of the United States," it should, at the expiration of that period, "make application to the supreme court of the District of Columbia by petition at a special or general term, for an assessment of the value of such land as it has been unable to purchase," with a description thereof, specification of the owners, etc. It was made the duty of the court, upon the filing of such petition, to appoint three commissioners to appraise the value of the land therein mentioned, and upon such appraisement to determine the value; also to direct the time and manner in which possession of the condemned property should be taken. And provision was made that, when the President of the United States, who was also authorized to intervene in the matter, should decide the valuation to be reasonable, payment should thereupon be made to the owners, and the United States should be deemed to have a valid title to the land. In the event of the refusal of the owner to take the amount of the valuation, or in the event of difficulty in regard to the title, the money was to be paid into court. Upon the payment of the money or the deposit thereof in the contingencies mentioned, possession was to be taken for the United States. One-half of the cost and expenses was to be reimbursed to the United States out of the revenues of the District of Columbia.

It was then provided by section 6 of the act, which is the part of the statute that has given rise to the present controversy, that the commission should proceed to make an assessment for special benefits on such property in the District of Columbia as would be benefited by the location and improvement of the park; and the mode was prescribed by which the assessment was to be made and enforced. This section, with the omission of such parts as are unnecessary to the present controversy, is as follows:

"SEC. 6. That the commission having ascertained the cost of the land, including expenses, shall assess such proportion of such cost and expenses upon the lands, lots, and blocks situated in the District of Columbia specially benefited by reason of the location and improvement of said park, as nearly as may be, in proportion to the benefits resulting to such real estate.

"If said commission shall find that the real estate in said District directly benefited by reason of the location of the park is not benefited to the full extent of the estimated cost and expenses, then they shall assess each tract or parcel of land specially benefited to the extent of such benefits as they shall deem the said real estate specially benefited. * * * When the assessment shall be completed, it shall be * * * filed in the office of the clerk of the supreme court of the District of Columbia. The commission shall apply to the court for a confirmation of said assessment, giving at least ten days' notice of the time thereof by publication in one daily

newspaper published in the city of Washington, which notice shall state in general terms the subject and the object of the application.

"The said court shall have power, after said notice shall have been duly given, to hear and determine all matters connected with said assessment; and may revise, correct, amend, and confirm said assessment, in whole or in part, or order a new assessment in whole or in part, with or without further notice, or on such notice as it shall prescribe; but no order for a new assessment in part, or any partial adverse action, shall hinder or delay confirmation of the residue, or collection of the assessment therefrom. Confirmation of any part of the assessment shall make the same a lien on the real estate assessed.

"The assessment when confirmed, shall be divided into four equal installments, and may be paid by any party interested in full or in one, two, three, and four years, on or before which times all shall be payable, with six per centum annual interest on all deferred payments. All payments shall be made to the Treasurer of the United States, who shall keep the account as a separate fund. The orders of the court shall be conclusive evidence of all previous proceedings necessary to the validity thereof, and of all matters recited in said orders. The clerk of said court shall keep a record of all proceedings in regard to said assessment and confirmation. * * * In case assessments are not paid as aforesaid the book of assessments certified by the clerk of the court shall be delivered to the
43 officer charged by law with the duty of collecting delinquent taxes in the District of Columbia, who shall proceed to collect the same as delinquent real estate taxes are collected. * * *

"All money so collected may be paid by the Treasurer on the order of the commission to any person entitled thereto as compensation for land or services. Such order on the Treasurer shall be signed by a majority of the commission and shall specify fully the purpose for which it is drawn. If the proceeds of assessment exceed the cost of the park, the excess shall be used in its improvement, under the direction of the officers named in section 8, if such excess shall not exceed the amount of $10,000. If it shall exceed that amount that part above $10,000 shall be refunded rateably. Public officers performing any duty hereunder shall be allowed such fees and compensation as they would be entitled to in like cases of collecting taxes. The civilian members of the commission shall be allowed ten dollars per day each for each day of actual service. Deeds made to purchasers at sales for delinquent assessments hereunder shall be *prima facie* evidence of the right of the purchaser, and any one claiming under him, that the real estate was subject to assessment and directly benefited, and that the assessment was regularly made; that the assessment was not paid; that due advertisement had been made; that the grantee in the deed was the purchaser or assignee of the purchaser, and that the sale was conducted legally.

"Any judgment for the sale of any real estate for unpaid assessment shall be conclusive evidence of its regularity and validity in all collateral proceedings, except when the assessment was actually

paid; and the judgment shall estop all persons from raising any objection thereto, or to any sale or deed based thereon, which existed at the date of its rendition, and could have been presented as a defense to the application for such judgment."

In pursuance of this act the park commission was duly appointed and entered upon the performance of its duties. It selected the land, and filed and recorded a map of it. Some of the tracts comprised in the map were acquired by purchase in pursuance of agreement with the owners; and for the acquisition of the other tracts, in reference to which agreement could not be had, a petition was filed in the supreme court of the District in accordance with the requirements of the act, for an appraisement of their value and their condemnation to the use of the United States.

Appraisers were appointed by the court. Upon the return of their report, it was found that the appropriation was not sufficient to pay for all the land selected, and some of the tracts were excluded, therein comprising two parcels, designated on the map as 13 and 16, belonging to the appellees in this cause. The money for the tracts that were taken was paid into court.

The proceedings in court for the acquisition of the lands not purchased by agreement were contested by some of the owners upon various grounds; and the proceedings were finally carried to the Supreme Court of the United States upon writ of error.

There the decision of the supreme court of the District of Columbia upon the petition filed by the park commissioners was affirmed. Shoemaker *v.* United States, 147 U. S., 282. Thereafter the fund in court was paid out to the respective owners upon reports of a special auditor; the lands became the property of the United States; and the park was finally established and turned over to the control of the officers named in the seventh section of the act to take charge of it, namely, the Chief of Engineers of the United States Army and the Commissioners of the District of Columbia.

Apparently, however, the duties of the park commissioners were not yet at an end. They were required by section 6 of the act to make an assessment for special benefits accruing by reason of the establishment of the park; and this they now proceeded to perform. They gave public notice of their intention to assess under this section; and announced that, on a day designated, they would first hear testimony as to the extent of surrounding land affected beneficially by the location and improvement of the park. The appellees and others, who were owners of adjoining lands, appeared and entered a protest against any proceeding by the commission to make any such assessment as they had proposed to make, on the ground that the land had already been taken and paid for, and no assessment was required for any further payment; that the only purpose of assessment, as specified, was to pay for the land and expenses, all of which already had been defrayed; that the powers and duties of the commission were at an end; that no special benefits had accrued to any of the lands in question, inasmuch as there had been no improvement whatever of the proposed park, and no change whatever from the

previous conditions; that the section of the act in regard to assessment was conflicting, meaningless, and unintelligible, and therefore incapable of enforcement; and that the principle of assessment for supposed benefits in such cases was erroneous and radically vicious.

The commission thereupon was adjourned for a time, it was understood, in order to take the opinion of the Attorney General of the United States on the question raised. This opinion the Attorney General declined to give; and it was supposed that the commission would then proceed with the work of assessment.

At this juncture the appellees commenced the present proceedings by filing their bill in equity in the supreme court of the District of Columbia to restrain the commissioners, by injunction, from further action in the way of levying an assessment on the property of the complainants; and the claim was set up that section 6 of the act was repugnant to the Constitution of the United States, and therefore void.

To this bill a demurrer was filed by the United States district attorney as solicitor for the park commissioners; and the demurrer was sustained on the ground that the application for injunction was premature. The cause was retained, however, with leave to the complainants to renew their application by supplemental bill or otherwise at a later stage of the proceedings of the park commissioners.

The park commissioners continued to hold their sessions; and on February 21, 1895, formally announced that they deemed certain property lying within a quarter of a mile from the
44 limits of the park to have been specially benefited by reason of the location of the park. They decided that, saving some exceptional cases, which the commission was not then ready to consider, there had been no special benefit accruing by reason of the location and improvement of the park to any land within the District of Columbia situated more than a quarter of a mile in any direction beyond the nearest park limits; but that the testimony thus far taken had established the fact, in their opinion, that certain properties within a quarter of a mile from the park and abutting upon it had been specially benefited. The only tract, however, that was specifically designated by the commissioners as so benefited, was tract No. 16, hereinbefore mentioned, the property of the appellees, which was held by them to have "been benefited by the location of the park, not only because of its proximity thereto, but because of its overlook of the park." No special sum of money was named as the amount of the supposed benefit, and there was no formal assessment of value, at least at that time. The designation was made in order to give the appellees a standing in court in the suit instituted by them, it being the avowed desire of the commissioners to have their powers and duties in the premises authoritatively defined for them by the court, as well as the rights of the complainants in the suit and other adjoining owners fully determined.

The appellees thereupon filed a supplemental bill, in which these

further proceedings by the park commissioners were set forth, and the application for an injunction against the commissioners was renewed. The bill and supplemental bill were then in part answered and in part demurred to by the commissioners. The answer, with some unimportant modifications, substantially admitted the allegations of the bill and supplemental bill; the demurrer was to the construction of the statute contended for by the complainants and to the relief sought by them. The cause was set down for final hearing on the bill, supplemental bill, answer, and demurrer. And the court, by Mr. Justice Cox, after having granted a temporary injunction *pendente lite*, finally awarded a permanent injunction perpetually enjoining and restraining the park commissioners from assessing the land of the complainants for the purposes specified by them or for any purpose whatsoever, and rendered a decree to that effect.

From this decree the commissioners have prosecuted the present appeal to this court.

1. The question of the jurisdiction of a court of equity to entertain jurisdiction of a suit of this kind, in view of the provisions of section 3224 of the Revised Statutes of the United States, lies at the threshold of this case, and cannot be ignored. It has not, in fact, been ignored in argument by counsel on either side, although both sides fully concur in the desire that the jurisdiction should be sustained. The appellees, having appealed to the jurisdiction as complainants, very naturally are willing to abide by it; and the appellants, who have desired to be guided by the advice of the court in the premises, and who might possibly, in view of their peculiar functions, be entitled to apply to a court of equity for guidance in the performance of their rather difficult duty, are equally solicitous for some authoritative exposition of the doubtful provisions of the law with regard to that duty. But this concurrence of desire cannot give jurisdiction to the court of equity, unless it can be shown otherwise to exist. We think, however, that this is a case proper for the cognizance of a court of equity.

Section 3224 of the Revised Statutes provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." This section was taken from the tenth section of the act of Congress of March 2, 1867 (14 Stat. 475), which was an amendment of the internal-revenue act of July 13, 1866 (14 Stat. 98), itself an amendment of the acts of June 30, 1864 (13 Stat. 223), and March 3, 1865 (13 Stat. 469); and it is found in the revision among the provisions for the collection of the internal revenue of the United States, where special provision is made for the recovery of taxes wrongfully levied. This would seem to indicate that it was not intended to apply to cases of special assessment, like that now before us, where it is not a question of the revenue of the United States, but to the matter of the ordinary taxes raised and intended for the support of the Government. A special assessment, it is true, is a tax, in the general sense of the term; but it is not such a tax as was contemplated by the statute that has been cited.

The statute seems to be no more than what was already the doctrine of equity, ever since the decision in the case of Mooers *v.* Smedley, 6 Johns. Ch. 28, by Chancellor Kent. A court of equity will not interfere with the collection of taxes simply on the ground that the taxes are illegal. To warrant the intervention of equity, as was said by the Supreme Court of the United States, in the case of Dows *v.* Chicago, 11 Wall. 109, by Mr. Justice Field, "there must exist in addition special circumstances bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant." But it is well settled that, where there are such special circumstances, equity will intervene, and the statute cited is no bar to the intervention.

In the case of the Union Pacific Railway Company *v.* Cheyenne, 113 U. S. 516, 525, the Supreme Court of the United States, by Mr. Justice Bradley, said:

"It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax: for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the tax-payer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the
45 cloud cast upon his title by a tax under which a sale could be made would be a grievance which would entitle him to go into a court of equity for relief."

In the case of Lyon *v.* Alley, 130 U. S. 177, 187, which went up from this District, the same high tribunal, speaking by Mr. Justice Lamar, said:

"It is a well-settled doctrine of this court that equity will not interpose to arrest the proceedings for the collection of a tax upon the sole ground of its illegality. It is equally well settled by the decisions of this court and the State courts that, after the land has been sold and a conveyance of some sort made to the purchaser, courts of equity have inherent jurisdiction to give relief to the owner against vexatious litigation and threatened injury to the market value of the land, by removing the cloud which such illegal sale, and the illegal claim arising from it, may cast upon the title. And in such case of damage, either existing or apprehended, equity will interpose for relief, even during the progress of the proceedings before the sale."

To the same effect are the more recent cases of Gage *v.* Kaufman, 133 U. S. 471, and Rich *v.* Braxton, 158 U. S. 375, 405.

The removal of a cloud from the title to land is, therefore, a well-recognized ground of equity jurisdiction, when such cloud is the

result of illegal taxation. The prevention of such a cloud is equally recognized. Prevention and removal are equally within the domain of the remedial processes of equity.

Very applicable to the present, as well as to another aspect of the question, is what the Supreme Court of the United States, by Mr. Justice Harlan, said in the case of Rich *v.* Braxton, *supra:*

"It must be remembered that 'it is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' Boyce *v.* Grundy, 3 Pet. 210, 215; Drexel *v.* Berney, 122 U. S. 241; Allen *v.* Hanks, 136 U. S. 300, 311. And the applicability of the rule depends upon the circumstances of each case. Watson *v.* Sutherland, 5 Wall. 74, 79. In the case now before us it cannot be said that the invalidity of the deeds which the plaintiffs seek to have cancelled appears on their face. It is not clear that their invalidity can be placed beyond question or doubt without evidence *dehors* those deeds.

"Besides, by the laws of West Virginia, the tax deeds under which the defendants claim are *prima facie* evidence against the owner or owners, legal or equitable, of the real estate at the time it was sold, his or their heirs or assigns, and all other persons who might have redeemed the same within the time prescribed by law, and conclusive evidence against all other persons that the material facts recited in them are true. Code of W. Va. 1868, ch. 31, sec. 27, &c., &c. Mr. Pomeroy, in his treatise on Equity Jurisprudence, while recognizing it to be the general rule, established by the weight of authority, that equity will not interfere to remove a cloud from title 'where the instrument or proceeding constituting the alleged cloud is absolutely void on its face, so that no extrinsic evidence is necessary to show its invalidity,' or 'where the instrument or proceeding is not thus void on its face, but the party claiming, in order to enforce it, must necessarily offer evidence which will inevitably show its invalidity and destroy its efficacy'—which doctrine, he says often operates to produce a denial of justice—correctly says that equity will interfere, where deeds, certificates, and other instruments given on sales for taxes are made by statute *prima facie* evidence of the regularity of proceedings connected with the assessments and sales. 3 Pomeroy's Eq. Jur., sec. 1399, and note 1, p. 437, and authorities there cited. And this view is sustained by numerous authorities. (Huntington *v.* Central Pacific Railroad, 2 Sawyer, 503, 514; Allen *v.* City of Buffalo, 39 N. Y. 386, 390; Palmer *v.* Rich, 12 Mich. 414, 419; Marquette, H. & O. R. R. *v.* Marquette, 35 Mich. 504; Milwaukee Iron Co. *v.* Town of Hubbard, 29 Wis. 51, 58; Weller *v.* St. Paul, 5 Minn., 95; Pixley *v.* Huggins, 15 Cal. 127; Tilton *v.* O. C. M. R. Co., 3 Sawyer, 22. See also 2 Blackwell on Tax Titles, sec. 1066, and authorities cited.) In the present case there are no defects of a controlling character that distinctly appear on the face of the tax deeds under which the defendants claim title. And as those deeds are made by statute *prima facie* evidence of title in the grantees named in them, and as, therefore, the plaintiffs, if sued in ejectment by the defendants, would be compelled, in order to defeat a recovery against them, to resort to

extrinsic evidence in support of their title, the deeds in question constitute a cloud upon that title, to remove which the plaintiffs may rightfully invoke the aid of a court of equity."

In the case now before us, the statute, under which the park commissioners are acting, expressly makes their assessment a lien upon the land assessed, and precludes inquiry into the regularity or validity of the antecedent proceedings, precisely as in the case of Rich *v.* Braxton, and their action, therefore, necessarily operates to cast a cloud upon the property of the complainants, in respect of which they can have adequate relief only in equity. It is upon the ground that, by the assessment made and threatened to be enforced by the commissioners, a cloud would be cast upon their title to their real estate, and they would be subjected to vexatious litigation and irreparable injury, they expressly seek in their amended and supplemental bill the interposition of a court of equity to relieve them from what is alleged to be the imposition of illegal taxation. And we think, upon the authorities cited, and upon the general principles of equity, that they are entitled to it.

It may be that they should have waited until the commissioners had definitely fixed the amount of the assessment upon their property, and had thereby completed the assessment. But this probably is a matter which the commissioners could have waived, as they have actually waived in their brief and in open court; and it is not apparent, under the peculiar circumstances of this case, that any good purpose would have been subserved by further delay. The commissioners had definitely announced their determination
46 to assess the property in question; in order to fix the amount of the assessment, they required testimony to be taken, which might have involved much delay and expense; and the testimony, when taken, would not have enlightened in any manner the question now at issue, which merely concerns the validity of the statute under which they are proceeding. The determination of the specific amount of the assessment would not have altered the record, or changed in any manner the rights of the parties, so far as they are to be determined by this suit. The question now before us is not the amount of the assessment, but the right of the commissioners to make any assessment.

It may be that this question of jurisdiction should be considered in another aspect also. The power conferred by the statute upon the supreme court of the District of Columbia "to hear and determine all matters connected with said assessment," might perhaps be regarded as a special jurisdiction to be exercised only under the conditions and in the mode prescribed by the statute, and without appeal to this court, since no appeal is expressly provided by the statute itself. But courts of general jurisdiction, and especially courts of equity, are not ousted of their jurisdiction, or of any part of it, except by positive legislation absolutely inconsistent with its continued exercise. Sedgwick on Statutory and Constitutional Law, ch. 4 and 8, and cases cited; Rhode Island *v.* Massachusetts, 12 Pet., 657. The prevention and removal of clouds upon title are subjects of the general equity jurisdiction; and the statute establish-

ing the Rock Creek park does not purport in the remotest degree to interfere with that or any other branch of equity. When the supreme court of the District of Columbia, whether as a court or as an appellate board of assessment, was given the authority conferred here "to hear and determine all matters connected with said assessment," it certainly was not contemplated that one of those matters would be the power of Congress to pass that act itself. And while a court of limited jurisdiction, a board of commissioners, an executive officer, or a private citizen, might decline to exercises powers conferred by a statute which is believed to be void, and would necessarily have to pass upon the question of the validity of the authority sought to be conferred in order to reach the conclusion, yet undoubtedly the attempt to confer such authority cannot in general deprive the courts of general jurisdiction of their right in cases within their cognizance to inquire into the validity of the attempt. The right of the citizen to have recourse to the courts of his country ought not to be construed to be taken away by indirection, where the protection of those courts is the most needed.

We have virtually so held in the cases of the District of Columbia *v.* Prospect Hill Cemetery and others (23 Wash. Law Rep., 162), where one of the consolidated suits was a bill in equity to restrain the enforcement of an unconstitutional or invalid statute, and where we affirmed the decision of the court below awarding an injunction in the case. In the same case, we sustained without question the appeliate jurisdiction of this court, which would have been ousted as well as the jurisdiction of equity, if the special jurisdiction there conferred on the supreme court of the District of Columbia were of the character to exclude the exercise of the general jurisdiction; for that also, like the present, was a case of special statutory authority. The case of Shoemaker *v.* United States, 147 U. S., 282, necessarily affirms the same doctrine; for that was a case growing out of this very same statute; and the Supreme Court of the United States there exercised without question the right of appeal from a judgment of the supreme court of the District of Columbia rendered in proceedings instituted under the same special jurisdiction. We do not mean to hold that a special jurisdiction is not to be exercised specially in accordance with the statute; but that the special jurisdiction here conferred on the supreme court of the District of Columbia does not preclude recourse to equity in proper cases of equity cognizance and does not take away the appellate jurisdiction of this court. (*Ex parte* Zellner, 9 Wall., 244.)

If we had any doubt about the jurisdiction of equity in this case, with the consequent right of appeal to this court, we would be disposed to resolve the doubt in favor of the jurisdiction, in view of the fact that, under the decisions in the cases of Shoemaker *v.* United States and The District of Columbia *v.* Prospect Hill Cemetery, the same precise question that is now raised could be raised by almost identical pleadings under an application of the park commissioners for a confirmation of their assessment. And we think that it is of no great consequence in which way the question is presented, and

that the case is one in which we should look rather to the substance than the form.

We are of opinion that this case is one proper for the cognizance of a court of equity.

2. With reference to the merits of the case, counsel for the appellants in their brief raise two questions, broad enough in their scope, and of very great importance: 1. Whether Congress has power to impose taxes upon land in the District of Columbia by way of assessment for special benefits accruing to such land by reason of the expenditure of public funds for works of public utility; and, 2. Whether, if such power exists, the act of September 27, 1890, providing for the acquisition of land for the Rock Creek park and the levy of assessments upon other lands, specially benefited by its establishment, is a valid exercise of the power. And the argument on behalf of the appellants is directed to show that both questions should be answered in the affirmative.

The extent of the jurisdiction of the Congress of the United States over the District of Columbia must be regarded as quite well settled. The District of Columbia was established for the purposes of the Federal Union, and not for any purposes of its own: and Congress acts therein as the legislature of the Union, but with exclusive jurisdiction extending to all legitimate subjects of legislation. Cohens *v.* Virginia, 9 Wheat. 264; Loughborough *v.* Blake, 5 Wheat. 317; Willard *v.* Presbrey, 114 Wall. 676; Mattingly *v.* District of Columbia, 97 U. S. 690. But that this exclusive jurisdiction is limited and restricted by the Federal Constitution and the
47 amendments thereof, and by the fundamental principles of right and justice recognized by that Constitution, is equally beyond question. Story on the Constitution, sec. 1234; Callan *v.* Wilson, 127 U. S. 540. There is no place anywhere in our system of government, State or Federal, for the theory of legislative omnipotence claimed to appertain to the English Parliament. But except in so far as it is thus restricted by the fundamental law, the legislative authority of Congress over the District of Columbia is supreme and unlimited.

Among the ordinary and essential attributes of sovereignty and subjects of legislation is the power of taxation, which, as Mr. Cooley says in his treatise on Constitutional Law, ch. 4, p. 55, is "unlimited in its range as to the kind of taxes that shall be laid, or the subjects upon which it shall be imposed." And yet this great and vast power of taxation is rigidly limited in the one respect that it must be uniform and equal in its operation, must be levied for public not for private purposes, and must be laid according to some definite and positive rule of apportionment. Taxes may be laid upon lands, upon personal property, upon occupations, upon special classes of property, or upon special occupations, or upon persons; but within the scope of the selection the tax must be uniform. One man cannot be taxed more in proportion than another. These are well established principles of the law of taxation that require no citation of authorities to support them.

It may be that this principle of uniformity is not secured for the

District of Columbia, with regard to the power of exclusive legislation over it that is vested in Congress by the requirement of the eighth section of the first article of the Constitution, that "all duties, imposts, and excises shall be uniform throughout the United States;" for that may well be construed to refer to taxes levied by Congress over the whole territory of the Union. But it is abundantly secured by the provision in the fifth amendment to the Constitution, that "no person shall be deprived of life, liberty or property without due process of law: nor shall private property be taken for public use without just compensation." For private property would be taken for public use without any compensation, and due process of law would absolutely be wanting in any system of taxation that was not uniform in its operations—not necessarily uniform in its results or operating to do exact justice, but free from undue discrimination as to persons.

Whether taxation by way of special assessment is free from the objection of want of uniformity is open to grave doubt. The practice of levying special assessmer seems to be now very generally established throughout our cou y by legislative and municipal action, and to have received the s tion of courts and of text-writers, yet evidently not without some isgivings as to the correctness in principle of the theory upon which the practice is based. See Cooley on Taxation, pp. 416, 417. With all due respect to the public sentiment in favor of the theory of special assessments and to the great preponderance of judicial decision by which it has been sustained, we are disposed to think that a system, to which a large part of the municipal corruption that exists in our country can be traced, and which leads to a result so absurd as that evidenced in the act of Congress now under consideration, must be radically vicious and unjust. We think that it is vicious, because it is arbitrary; all things arbitrary in the administration of government are vicious. We think that it is unjust, because it compels the individual citizen in many cases, probably in most cases, to pay more than his just share of the common burden for the public good.

Special assessments are levied arbitrarily and without any rule having a fixed foundation in justice. They are usually authorized in connection with some unusual scheme of public improvement like this Rock Creek Park enterprise in the present instance. Generally they do not form part of any permanent or well-established scheme of taxation; and they vary in their scope and terms with every varying enterprise to the aid of which they are applied. Sometimes one-fourth, sometimes one-third, sometimes one-half, and sometimes even two-thirds or three-fourths of the cost of a public improvement is levied under the theory of special assessment upon adjoining owners supposed to be benefited specially by such public improvement. And if any part of the cost may so be assessed, the whole may be. Indeed, in the very case before us, it is sought to cast the whole and entire cost of the enterprise upon the adjoining owners; and the theory is carried to its extreme extent, a conclusion that would make it ludicrous if it were not so grossly oppressive.

But if these works, for which special assessments are sought to

be levied, are public works, the public alone should pay for them. If they are not public works, the public authorities have no right to undertake them. We believe that there is no middle ground of partnership in such works between the public and the individual citizen; and that compulsory payment therefor by the individual citizen is unjust, when perhaps he has not requested the improvement and may even have antagonized it. The system grew out of early legislation, in which, when the opening of streets or other public enterprises was somewhat in advance of the requirements or of the resources of a municipality or community, and private individuals, specially interested, and to whom the enterprise would be an immediate benefit requested the work, compliance with their request was authorized upon their assumption of a share of the expense. But in those cases the special assessment was the result of a contract, and was therefore never compulsory.

We are aware that there is very great plausibility in the theory of special assessment. At first sight it seems to be exceedingly just and equitable that one whose property has been enhanced in value by its proximity to a public improvement, should contribute to the cost of that improvement in proportion to the amount of benefit received by his property. But the proposition it more plausible than sound. Apart from the incongruity of benefiting one without his consent and possibly against his will and then levying a contribution upon him for that in which he has had no voice, and assuming that the so-called benefits are not illusory and
48 intangible, the fair and just contribution of the citizen is secured without arbitrary exaction by the increased assessment of his property for general taxation and the increased returns therefrom to the general fund. Moreover, it is not quite apparent, upon general principles of justice, why, when a public improvement is located in a certain neighborhood, without inducement by adjoining owners for its location there, peremptory demand should then be made upon those owners to hand over to the public a sum of money equivalent to the supposed enhancement of their property in value by reason of the location of the public improvement. A private individual, who improves a neighborhood by building therein, could not with much grace support a demand upon his neighbors for contribution to the cost of his building, on the ground that their property has been enhanced in value by his action; and there does not seem to be any better reason for the public to do so. Nor, when contrary conditions arise, is there any rule of law or equity that requires the public to compensate an adjoining owner, when his property has been depreciated in value by the location in his neighborhood of a jail, or a pest-house, or any other similar undesirable structure. The sovereign, or a municipality as the representative of the sovereign, should not shield itself in the one case behind the theory that the state can do no wrong, and yet claim in the other case that there is natural equity in its favor.

But while we have deemed it not improper thus strongly to express our views upon the substantial merits of the theory of special

assessment, it must be admitted, as we have already stated, that the great preponderance of judicial authority is in favor of sustaining the validity of legislative action which imposes such assessment. In our own jurisdiction the Supreme Court of the United States, in the case of Mattingly *v.* District of Columbia, 97 U. S. 687, has sustained the theory, upon the ground merely of the great current of judicial decision to that effect; and to that authority, of course, we must bow. It is not necessary for us in the present case to base our decision upon the hardship of special assessments, or upon the supposed unsoundness of the theory upon which they are sustained. The theory has its limitations and restrictions, as has the power of general taxation; and we think that it will be found, upon a closer analysis of the authorities, at all events of the best authorities upon the subject, that the theory has been applied only when some easement or appurtenance has been added to the lands of the person assessed, or when some advantage has been given him which he did not possess before, such generally as the improvement of a street for access to his property or the construction of a sewer for the drainage of his land, or some similar work which he could and should have done for himself, if it were not that such work by a private individual for obvious reasons would be impracticable.

The Rock Creek park, authorized by the statute now before us, is nothing of that kind. It is something, as expressly declared in the act, "perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States." It is a public enterprise, therefore, for a purely public purpose, and for the general benefit of all the people of the Union; and assuming that, inasmuch as it is located in the District of Columbia, and is of special benefit to the District of Columbia, Congress can properly impose a special assessment on the District of Columbia to defray a part of its expense, it does not follow that it can go farther and impose the whole cost or any part of it upon any individual or number of individuals in the neighborhood whom it pleases to select for the purpose of assessment. Recognized territorial subdivisions, such as counties, townships, municipalities, may undoubtedly be specially assessed under the authority of the State for a share of the cost of works of public improvement located within their borders; for the reason that such territorial organizations are only creatures of the State for governmental purposes and are wholly within the control of the State; and what we have heretofore said in reference to special assessments in general has no application to them. This much we understand to have been decided in the case of Mobile *v.* Kimball, 102 U. S. 691; and this also is the extent to which we understand the intimation to go of the Supreme Court of the United States in the case already cited of Shoemaker *v.* United States, 147 U. S. 282. Nor do we understand that any different principle is laid down by any of the decisions cited in the latter case. But individual citizens cannot thus be selected for assessment, nor can their property be constituted a special taxing district for the occasion. Mr. Justice Cox, in his excellent opinion in this case, well said:

"When it comes to assessing individuals for public improvements, the question seems to be different. Suppose, for example, a court-house or a public monument or post-office should be erected in a town and the private property of individuals adjacent to it should be specially taxed for the supposed greater convenience which they enjoy of access to the court-house or post-office, or the privilege of gazing upon the public monument, it would at once be seen that great injustice had been done. It does seem to me that this would be a system of taxation which would not conform to the spirit of our Constitution. It might as well have been held proper to assess the buildings opposite this court-house for the pleasure of gazing upon the Lincoln monument, if that monument had been erected by public authority."

In this we fully concur. We think that it fairly and justly expresses the law on the subject. The sixth section of the act of Congress of February 27, 1890, establishing the Rock Creek park, so far as it can possibly be construed to have a meaning, has for its sole object and purpose the imposition of a special assessment on the lands adjoining the park for the purpose of paying the cost and expense of the park. In fact, it seems to have been contemplated that such special assessment might pay the whole cost and expense of the park, including even the compensation payable to the commissioners, and leave a surplus to be expended in the improvement of the grounds. More than that—the section is capable of a construction that would make the enterprise a speculation of most
49 extraordinary and remarkable profit to the United States; for besides the fact that under it an assessment would be possible that would secure sufficient money to replace in the Treasury of the United States the whole amount of $1,200,000 that was expended in the acquisition of the land for the park, there is the provision that the District of Columbia as a municipality must in any event refund one-half the amount, or $600,000, to the Treasury. So that it would be quite feasible under the act for the United States to receive $1,800,000 by a levy of forced contribution to reimburse them for their expenditure of $1,200,000. Such a result would be shocking to our sense of natural justice, to all our ideas of constitutional guaranty, and to our whole theory of governmental propriety. An enactment that necessarily leads to this conclusion we are compelled to regard as a violation of the Constitution of the United States.

3. But proceeding one step farther, we find that not only is this section violative of the fundamental law of the land, it is likewise so hopelessly inconsistent and meaningless that it is impossible to determine its sense with any certainty; and consequently impossible to execute it with any propriety, even if it were not affected with the fatal taint of unconstitutionality. It is very evident that this section was passed without much, if any, consideration by Congress. It does not reflect the legislative mind or express the legislative intention, and it is so hopelessly involved in palpable inconsistency and a maze of meaningless verbiage that it is impossible to apply to it any of the canons of construction that a

court is authorized to apply in such cases. Counsel for the appellants virtually ask us so to reconstruct the phraseology of the enactment as to give it sense and meaning. Courts have gone very far, where the legislative intention is clear, to disregard words and terms that were evidently not contemplated to be in the statute, in some cases even converting negative phrases into positive phrases, and the reverse (Chapman *v.* State, 16 Tex. App., 78); but in all such cases the meaning intended by the legislature must be clear from the context. Not only is the meaning in the present case not clear: it is difficult, if not impossible to deduce any meaning from the language employed. We can add nothing to the excellent analysis of the section made by Mr. Justice Cox, in his opinion, which appears in the record in the case; and we can do no better than concur in that opinion and embody it in our own.

One feature of that opinion we may emphasize. One clause of section 6 seems to authorize assessment by the commissioners for benefits accruing from the *location* and *improvement* of the park; another clause for benefits accruing from the *location* alone. It is conceded that there has been absolutely no *improvement* whatever of the park thus far, and that the only change is in the transfer of title to the United States. The only power to assess is, therefore, in the clause which authorizes assessment for location, if it does, in fact, so authorize; and here again it is conceded that there has been no change whatever from previous conditions. Adjacent owners, then, are to be assessed because the United States have taken title to a tract of land adjoining them, in order to lessen the burden of expense to the United States. To state the proposition is to demonstrate its gross absurdity.

We think that the decree of the supreme court of the District of Columbia in the premises was right; and that decree must be *affirmed with costs.*

Dissenting Opinion by Mr. Chief Justice Alvey.

I regret very much that there should be any dissent from the opinion of the majority of the court in this case. But I feel compelled to dissent from the opinion and conclusion of my brothers in respect to the two main propositions maintained by them in their opinion. First, that there is jurisdiction in a court of equity to grant the relief prayed for in the original and supplemental bill, upon which the decree below was founded; and, second, that the express power given by the sixth section of the act of Congress of September 27, 1890, authorizing the assessment of real estate for special benefits accruing thereto, by reason of the establishment of a public park in the District of Columbia, is in violation of the Constitution of the United States, and therefore utterly void.

I shall state the reasons of my dissent on these two propositions briefly, and shall, therefore, not attempt to recite the allegations of the bill. Suffice it to say, that the application for and the granting of the injunction were both before any assessment had been actually made upon the property of the complainants; and that, while

there are many grounds alleged in the bill for the injunction, the principal ground for the relief prayed, is that of the supposed unconstitutionality of the sixth section of the act of Congress authorizing the establishment of the park.

The defendants, United States officers and agents, constituted by the act a commission to lay off and acquire the land for the park, either by purchase or condemnation, with authority to make the special assessments upon the lands specially benefited by the improvement, answered certain parts of the original and supplemental bill of the complainants, and demurred to certain other parts; and for cause of demurrer, alleged that the complainants have not in and by their original and supplemental bill, made or stated such a case as entitles them to any relief in a court of equity.

On this state of the record the majority of this court hold, as I understand the opinion, affirming the decree of the court below, that a court of equity has jurisdiction to take cognizance of the case, and that the sixth section of the act of Congress involved is entirely unconstitutional and therefore void, and that, consequently, the complainants are entitled to a perpetual injunction against the exercise of any of the powers thereby attempted to be conferred by Congress.

1. With respect to the first question presented, that of the jurisdiction of a court of equity to take cognizance of the case,
50 I entirely dissent from the opinion of the majority of the court. Congress having by the act in question provided the mode of procedure, and conferred, by expressed terms, jurisdiction upon the supreme court of the District, "to hear and determine *all matters connected with said assessment;* and to revise, correct, amend, and confirm said assessment, in whole or in part, or order a new assessment, in whole or in part, with or without further notice, or on such notice as it shall prescribe;" and declared that "the orders of the court shall be conclusive evidence of the regularity of all previous proceedings necessary to the validity thereof, *and of all matters recited in said orders,*" in my opinion, a court of equity has no power to review and control the action of the supreme court of the District, in the exercise of its powers and jurisdiction under the statute. That jurisdiction is exclusive, subject only to the right of appeal to an appellate jurisdiction upon questions of constitutional rights actually involved in the proceeding. To give to a court of equity jurisdiction, in the absence of express statute, there must be presented a case where the principles of law, by which the ordinary courts are guided, give right, but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate to attain full and complete justice; or where the courts of ordinary jurisdiction are made instruments of injustice; or where the principles of law by which the ordinary courts are governed give no rights, but upon the principles of universal justice, the interference of a court of equity is necessary to prevent a wrong, the positive law being silent. In neither of these categories is the present case embraced. There is ample remedy provided by the statute; and where the legislature has given jurisdiction by

statute to a designated court, for taking and conducting proceedings under the statute, and especially where it has made the decision of that court final, no equity can be founded on the allegation that such court is not properly competent to decide questions that may arise within its jurisdiction. In such case, a court of equity does not become a court of review, nor can it be made subsidiary to the tribunal created or clothed with power by the legislature for settling the rights of parties, upon the mere ground that that tribunal has miscarried, or may miscarry, in the settlement of those rights. Canal Co. *v.* Twibell, 7 Beav. 19, 28; Bateman *v.* Boynton, L. R. 1 Ch. App. 360, 368. The supreme court of the District was given power and jurisdiction, by the terms of the statute, after due notice given, "*to hear and determine all matters* connected with said assessment;" and the mode of proceeding prescribed by the statute, is due process of law. The supreme court of the District was and is competent to decide every question, connected with the assessment, that could arise or be presented in the course of the proceeding, including the question of the constitutionality of the act itself. In the event of holding the act, or any part of it, unconstitutional, or the refusal so to hold it, upon presentation of such question to the court by exception to the report of the commissioners, an appeal would lie to this court, as a writ of error did lie to the Supreme Court of the United States before this court was established. Shoemaker *v.* United States, 147 U. S. 282. And even an appellate court, much less a court of equity on a collateral application, will not interfere with the report of commissioners, to correct errors of procedure, or errors of judgment in arriving at the amount of assessment. Mills on Eminent Domain, 246; Shoemaker *v.* United States, *supra*. This is well illustrated by the much-cited case of Mooers *v.* Smedley, 6 John. Ch. 28. In that case the supervisors of a town, under an act of the legislature, and pursuant to the vote of the town, allowed bounties for the destruction of wolves, the amount of which was inserted in the annual tax-list, to be levied and collected of the owners of land. On an application for an injunction, to restrain the collection of the sums so allowed for bounties, the injunction was denied. And in denying the injunction, Chancellor Kent remarked: "I cannot find, by any statute, or precedent, or practice, that it belongs to the jurisdiction of chancery, as a court of equity, to review or control the determination of the supervisors, in their examination and allowance of accounts as chargeable against their county, or any of its towns, and in causing the money so allowed to be raised and levied. There was no allegation of fraud or corruption in the case. The most that could be said, was, that they made an erroneous determination." That case has been cited and approved by the Supreme Court of the United States in the case of Hannewinkle *v.* Georgetown, 15 Wall. 548. In the present case, as in the case of Moores *v.* Smedley, there is no allegation or pretence that there is any fraud or corruption in the case. Here, there was a competent court provided to direct and supervise the proceedings of the commissioners.

The effort to introduce an element that would give jurisdiction to

the court, by alleging that the threat of assessment for special benefits would produce a cloud upon the title of the property of the complainants, because, if consummated, such assessment would create a lien upon the property, will not justify a court of equity in interposing, and thereby become a court of review upon the proceedings authorized by the statute. Such allegation is easily made, and it could as well be made in every case of proceeding at law, where the judgment would create a lien upon the property of the debtor, as in the present case. There must be something more than the mere fact, that the property may be subject to a lien, as the final result of the pending proceeding, in order to confer jurisdiction upon a court of equity to arrest such proceeding by injunction. In this case, according to the theory and assumption of the bill, the attempted assessment for special benefits, is unconstitutional and void, because the act of Congress was passed without constitutional warrant, and is therefore void upon its face. If this be true, according to well-established principle, there is no such cloud upon the title as will justify the interference of a court of equity; the statute showing upon its face that it is without force or authority to charge the estate. Dows *v.* The City of Chicago, 11 Wall. 109; Hannewinkle *v.* Georgetown, 15 Wall. 548.

51 Courts of equity are not constituted for the purpose of arresting proceedings, and assuming to themselves the right of disposing of cases, that are properly depending in the ordinary courts of law. It is only upon special and particular circumstances, appealing to the conscience of the chancellor, that a court of equity is justified in interposing for the relief of the party complaining. A court of equity is not constituted a court of review on constitutional questions that may be decided by tribunals inferior to the Supreme Court of the United States; nor is such court possessed of exclusive, nor even of concurrent, jurisdiction in respect to such questions; and hence there is no authority or reasonable ground for coming to a court of equity in a case like the present. In every case, circumstances should be stated that show that in the particular case there is an equity that cannot be availed of by the party complaining, in the proceedings sought to be restrained. There can be no reason or propriety in appealing to a court of equity to restrain proceedings that are being regularly conducted in other courts, competent to construe the statutes under which they act, and to decide every question that may arise in the course of the proceeding. To allow litigations to be thus diverted, tends to the multiplication of litigation, and the production of unnecessary delay and expense, to say nothing of the unnecessary vexation to parties. I am of opinion, therefore, that there is no jurisdiction in equity to maintain the bill in this case.

2. But, assuming the existence of jurisdiction, and that the question was properly before this court for decision, in such case, I should have no difficulty whatever in holding that the sixth section of the act of Congress of September 27, 1890, 26 Stat. 492, ch. 1001, is constitutional and valid. Looking to the large and unrestricted legislative power of Congress over this District, under the Constitution,

if the power to authorize assessments for special benefits, by reason of improvements, exists anywhere, it would seem certainly to exist here. The sixth section, declared unconstitutional by the opinion of the majority of the court, forms a vital part of the act, and in fact constitutes the basis of the plan and scheme of the park. Without the provision contained in the sixth section of the act, to supply the means of indemnity and reimbursement, it can hardly be supposed that Congress would have passed the act, and charged the entire cost and expense of the improvement to the Treasury of the United States, and to the District of Columbia. It was in view of what was deemed a well-settled principle, that of legislative power to authorize assessments for special benefits, that Congress provided by the sixth section of the act, that the commissioners should assess, by way of indemnity and reimbursement, "such proportion of the cost and expenses upon the lands in the District of Columbia specially benefited by reason of the location and improvement of said park, as nearly as may be, in proportion to the benefits resulting to such real estate." The constitutional power to impose such assessments for special benefits, was supposed to be too well established to be made a matter of serious question. It had been so expressly decided by the Supreme Court of the United States, in cases arising in this District. Hannewinkle *v.* Georgetown, 15 Wall. 547; Mattingly *v.* Dist. of Col., 97 U. S. 687. And in a case arising under the very statute now under consideration, the question of the constitutionality of the sixth section of the act was pointedly made and expressly decided in affirmance of the validity of the section, and of the entire act. Indeed, to strike from the statute the sixth section, as being unconstitutional, or otherwise void, is simply to disembowel the act, and destroy the means designed for the ultimate payment of the cost and expenses of the improvement, and impose the whole burthen upon the United States Treasury and the District of Columbia. This is a very grave consequence of declaring the sixth section of the act unconstitutional, or otherwise inoperative, and it should only be so declared upon the plainest and most unmistakable ground. In my judgment, with all due deference to the opinion of my brothers, the sixth section of the act is not only constitutional upon general principles of legislative power, but it has been so expressly declared by the Supreme Court of the United States, in the case just referred to, of Shoemaker *v.* United States, 147 U. S. 302.

In that case, the court, in considering the several questions that involved the constitutionality of the entire act, said: "A further objection is made to the validity of the act, by reason of the sixth section, which provides for the assessment of benefits resulting from 'the location and improvement of said park,' upon lands so especially benefited.

"The cases heretofore cited to show that the erection of parks in cities is a public use, in a constitutional sense, were, most of them, cases in which it was likewise held that it is competent for the legislature, in providing for the cost of such parks, to assess a proportionate part of the cost upon property specially benefited; and we need not repeat the citations.

"No special request, on the subject of the legal effect of the provision in respect to special benefits, seems to have been made to the court below, and there is no specific assignment of error as to it. Nor does it appear that any person having property actually assessed for special benefits is a party as plaintiff in error. We are therefore relieved from any extended consideration of this feature of the act."

And, in the conclusion of the opinion, the court say, "Our conclusion is that we find, in the legislation creating the park and in the proceedings under it, no infringement of the Constitution or of the legal rights of the plaintiffs in error, and the judgment of the court below is accordingly affirmed."

This broad declaration as to the validity of the act would hardly have been made by the court, if one of the principal parts of the statute, and which had been urged as being unconstitutional, and therefore affecting the validity of the entire act, had appeared to the court as being subject to the objection taken to it. I see nothing in the sixth section of the act which requires from the court the declaration that the section is unconstitutional, or otherwise void, or inoperative, either in whole or in part. And being of this opinion, I must dissent from the opinion of the majority of the court; and, according to my opinion, the bill filed in this case should have been dismissed.

52 TUESDAY, *March 17th, A. D.* 1896.

WILLIAM P. CRAIGHILL, CHARLES F. POWELL, Henry V. Boynton, Samuel P. Langley, and R. Ross Perry, Constituting and Composing the Commission to Select the Land for Rock Creek Park, Appellants,

vs.

MARY VAN RISWICK, Widow, AVARILLA Lambert and Martina Carr, Children and Sole Heirs-at-law of John Van Riswick, Deceased.

No. 521.
January Term, 1896.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, affirmed, with costs.

Per MR. JUSTICE MORRIS.

March 17, 1896.

Dissenting: Mr. Chief Justice Alvey.

53 TUESDAY, *March 24th, A. D.* 1896.

WILLIAM P. CRAIGHILL, CHARLES F. POWELL, HENRY V. Boynton, Samuel P. Langley, and R. Ross Perry, Constituting and Composing the Commission to Select the Land for Rock Creek Park, Appellants,
vs.
MARY VAN RISWICK, Widow, AVARILLA LAMBERT and Martina Carr, Children and Sole Heirs-at-law of John Van Riswick, Deceased. } No. 521.

On motion of Mr. A. A. Birney, attorney for the appellants in the above-entitled cause, it is ordered by the court that said appellants be allowed an appeal to the Supreme Court of the United States on giving bond in the sum of three hundred dollars.

54 In the Court of Appeals of the District of Columbia.

WILLIAM P. CRAIGHILL, CHARLES F. POWELL, HENRY V. Boynton, Samuel P. Langley, and R. Ross Perry, Constituting and Composing the Commission to Select the Land for Rock Creek Park, Appellants,
vs.
MARY VAN RISWICK, Widow, AVARILLA LAMBERT and Martina Carr, Children and Sole Heirs-at-law of John Van Riswick, Deceased, Appellees. } No. 521.

Stipulation.

Mary Van Riswick, one of the complainants in the original and supplemental bills filed in this cause and who was tenant in dower only of the parcels of ground in respect of which the relief prayed in said bills is sought, having departed this life on the 24th day of February, 1896, and her interest in this cause having been extinguished by her death, it is thereupon, this 26th day of March, 1896, stipulated and agreed between the solicitors for the appellants and the solicitors for the surviving appellees that the death of the said Mary Van Riswick be suggested to the court, and that the court shall pass an order that the bond required to be given by the appellants on their appeal to the Supreme Court of the United States, heretofore allowed, from the decree passed by this court herein, shall run in the name of the surviving appellees, and that said appeal may be prosecuted as against said surviving appellees.

LAMBERT AND LAMBERT,
Solicitors for Surviving Appellees.
HUGH T. TAGGART,
JOHN E. LASKEY,
Assistant U. S. Attorneys, Solicitors for Appellants.

Filed M'ch 26, 1896.

ROBERT WILLETT, *Clerk.*

55 THURSDAY, *March 26th, A. D.* 1896.

WILLIAM P. CRAIGHILL, CHARLES F. POWELL, HENRY V. Boynton, Samuel P. Langley, and R. Ross Perry, Constituting and Composing the Commission to Select the Land for Rock Creek Park, Appellants,
vs.
MARY VAN RISWICK, Widow, AVARILLA LAMBERT and Martina Carr, Children and Sole Heirs-at-law of John Van Riswick, Deceased, Appellees.
} No. 521.

The death of Mary Van Riswick, one of the complainants to the original and supplemental bills filed in this cause, as tenant in dower of the premises in respect of which relief is prayed for in said bills, having been suggested, it is thereupon ordered, pursuant to stipulation of solicitors for the appellants and solicitors for the surviving appellees, that the bond required by an order of this court to be given on the appeal of said appellants to the Supreme Court of the United States shall run in the name of the surviving appellees, and that said appeal may be prosecuted as against said surviving appellees.

By the court:

R. H. ALVEY, *Ch. Justice.*

56 Know all men by these presents that we, William P. Craighill, Charles F. Powell, Henry V. Boynton, Samuel P. Langley and R. Ross Perry, composing the Rock Creek Park Commission, as principals, and Augustus S. Worthington, as surety, are held and firmly bound unto Avarilla Lambert and Martina Carr in the full and just sum of three hundred dollars ($300), to be paid to the said Avarilla Lambert and Martina Carr, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-seventh day of March, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between William P. Craighill, Charles F. Powell, Henry V. Boynton, Samuel P. Langley, and R. Ross Perry, constituting and composing the commission to select the land for Rock Creek park, appellants, and Mary Van Riswick, widow (now deceased), Avarilla Lambert and Martina Carr, children and sole heirs-at-law of John Van Riswick, deceased, appellees, a decree was rendered against the said appellants, and the said appellants having been allowed an appeal to the Supreme Court of the United States to reverse the said decree in the aforesaid suit, and a citation directed to the said Avarilla Lambert and Martina Carr, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said

William P. Craighill, Charles F. Powell, Henry V. Boynton, Samuel P. Langley, and R. Ross Perry, as such commission, shall prosecute said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

WM. P. CRAIGHILL.	[SEAL.]
CHARLES F. POWELL.	[SEAL.]
HENRY V. BOYNTON.	[SEAL.]
S. P. LANGLEY.	[SEAL.]
R. ROSS PERRY.	[SEAL.]
AUGUSTUS S. WORTHINGTON.	[SEAL.]

Sealed and delivered in the presence of—

—— ——.

Allowed by—

R. H. ALVEY, *Ch. Justice.*

[Endorsed:] No. 521. William P. Craighill *et al.*, appellants, *vs.* Avarilla Lambert *et al.* Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed March 30, 1896. Robert Willett, clerk.

57 UNITED STATES OF AMERICA, *ss:*

To Avarilla Lambert and Martina Carr, children and sole heirs-at-law of John Van Riswick, deceased, survivors, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein William P. Craighill, Charles F. Powell, Henry V. Boynton, Samuel P. Langley, and R. Ross Perry, constituting and composing the commission to select the land for Rock Creek park, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 30th day of March, in the year of our Lord one thousand eight hundred and ninety-six.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged.
MARTINA CARR.

Service acknowledged for Avarilla Lambert.
TALLMADGE A. LAMBERT.

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 3, 1896. Robert Willett, clerk.

58 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 57, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of William P. Craighill *et al.*, constituting and composing the commission to select the land for Rock Creek park, appellants, *vs.* Mary Van Riswick, widow, *et al.*, No. 521, January term, 1896, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 15th day of April, A. D. 1896.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: Case No. 16,271. District of Columbia Court of Appeals. Term No., 504. William P. Craighill, Charles F. Powell, Henry V. Boynton, Samuel P. Langley, and R. Ross Perry, constituting and composing the commission to select the land for Rock Creek park, appellants, *vs.* Avarilla Lambert and Martina Carr, children and sole heirs-at-law of John Van Riswick, deceased, survivors. Filed April 29, 1896.

No. 504. 164.

Motion Papers for Appellee.

Filed Dec. 14, 1896.

Office Supreme Court, U. S.
FILED.
DEC 14 1896
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

WILLIAM P. CRAIGHILL ET AL., appellants,
v.
AVERILLA LAMBERT ET AL. } No. 504.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

WILLIAM P. CRAIGHILL ET AL., appellants, v. AVERILLA LAMBERT ET AL. } No. 504.

MOTION TO ADVANCE.

Under the provisions of the *Act of February 27, 1890*, chapter 1001 (26 Stat. L., 492), entitled "An act authorizing the establishing of a public park in the District of Columbia," the appellants here were appointed a commission to select land for the Rock Creek Park, in the District of Columbia. In carrying out the provisions of the act, which directs the commission after having ascertained the cost of the land to be taken for the park, etc., to assess a proportion of such cost upon "lands, lots, and blocks" especially benefited by reason of the location and improvement of the park, the commission was met with a bill for an injunction filed by the appellees here in the Supreme Court of the District of Columbia to restrain them from making the assessment as provided by section 6 of the act. To the injunction bill a demurrer was

interposed and sustained, with leave to renew the application at a later stage of the proceedings of the commission. On a subsequent supplemental bill renewing the original averments the court granted an injunction *pendente lite*, which was afterwards made perpetual. On appeal to the Court of Appeals the decision below was affirmed.

The principal questions involved in the appeal are whether Congress has power to impose taxes on land in the District of Columbia by way of assessments for special benefits accruing to such land by reason of the expenditure of public funds for works of public utility; and, second, whether the act above referred to is a valid exercise of such power.

As there has been expended in the enterprise of providing a public park in the District of Columbia more than $1,000,000, and as there is general public interest in the determination of these questions as affecting large quantities of land, it is respectfully suggested that the case is one which should be determined during the present term of this court.

The Solicitor-General therefore respectfully moves the court to advance the case on the docket, and set it down for hearing on such day as may be convenient to the court.

Notice of this motion has been given to opposing counsel.

HOLMES CONRAD,
Solicitor-General.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

PETER H. WENDELL AND WILLIAM H. BOSS (SURVIVORS OF WILLIAM I. BOSS, DECEASED), CHARLES H. BOSS, HENRY BOSS AND EDWARD F. LANSING, AND H. KIRK PORTER, EXECUTOR, AND TRUSTEE UNDER THE WILL OF ELIZA BOSS, DECEASED, THE LAST NAMED BEING OF BOSS CREEK FARM, APPELLANTS,

v.

AVARILLA ARCHERD AND MARIETTA CLUTE, CHILDREN AND ONLY HEIRS AT LAW OF JOHN VAN BUSKIRK, DECEASED, SURVIVORS.

No. 166.

MOTION OF ASSISTANT FOR APPELLEE FOR LEAVE TO FILE BRIEF.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

JOHN M. WILSON AND WILLIAM M. Black (successors to William P. Craighill, Charles F. Powell), Henry V. Boynton, Samuel P. Langley, and R. Ross Perry, constituting and composing the commission to select the land for Rock Creek Park, appellants,
v.
AVARILLA LAMBERT AND MARTHA Carr, children and sole heirs at law of John Van Riswick, deceased, survivors.

No. 159.

STATEMENT.

The case comes into this court by appeal from a judgment of the court of appeals of the District of Columbia, affirming a decree of the supreme court of the District, granting an injunction against appellants, the Rock Creek Park Commission, to restrain them from levying an assessment on lands of the appellees, adjoining the Rock Creek Park, on account of benefits accruing by reason of the establishment of the park.

Under the provisions of the act of September 27, 1890, authorizing the establishment of a public park in the District of Columbia (26 Stats., 492), the appellants were appointed a commission to select land for the Rock Creek Park. For convenience of reference the act is printed as an appendix to this brief.

The act authorized the commission to select the land for the park, to prepare and record an accurate map of the park, and to take the necessary steps, by purchase or condemnation, to acquire the land selected. An appropriation of $1,200,000, or so much thereof as might be necessary, was made to pay the expenses of inquiry, survey, assessment, cost of lands taken, and all other necessary expenses incident to the establishment of the park (sec. 6).

The commission took the proper steps under the act to locate and establish the park and to acquire the land included within its boundaries. The objections to their proceedings in the condemnation of the land for the park were finally disposed of by the decision of this court in *Shoemaker* v. *United States* (147 U. S., 282), and thereafter the appropriated fund deposited in court as compensation for land condemned was paid out to the respective owners upon reports of a special auditor.

After the decision in the Shoemaker Case the park commission having ascertained the cost of the land, including expenses, were about to proceed under section 6 of the act to assess the same upon the lots, lands, and blocks situated in the District of Columbia specially benefited by reason of the location and improvement of the park

in proportion to the benefit resulting to such real estate, when they were met with a bill for an injunction filed by the appellees in the supreme court of the District to restrain them from making the assessment required by this section of the act. (Rec., p. 2.) To this bill a demurrer was interposed, which was sustained (Rec., p. 18), with leave to renew the application at a later stage in the proceedings of the commission. Subsequently a supplemental bill was filed (Rec., p. 19) renewing the averments of the original bill and setting forth certain steps taken by the commission toward making an assessment upon the lands of the appellees.

The salient objections to the proposed assessment for benefits were these:

1. The land had already been taken and paid for out of the Government appropriation, and no assessment was required for any further payment.

2. The powers and duties of the commission were at an end.

3. No special benefits had accrued to the land in question, inasmuch as there had been no improvement of the proposed park and no change whatever from previous condition.

4. Section 6, authorizing the assessment for benefits, is conflicting, meaningless, and unintelligible in its provisions, and therefore incapable of execution.

5. The principle of assessment for supposed benefits under such circumstances is essentially vicious, and the provisions of section 6, authorizing such assessment, are repugnant to the Constitution of the United States.

The court granted an injunction *pendente lite* (Rec., p. 25), upon the ground set forth in the opinion of Cox, J. (Rec., p. 26). The appellants then answered as to part and demurred to the residue of the original and supplemental bills (Rec., p. 33). The cause was heard on the bills and answer and the demurrer, and the court rendered a decree making the injunction perpetual, for the reasons stated in the opinion delivered on the application for the injunction *pendente lite*. From this decree an appeal was taken to the court of appeals of the District, and the judgment of the supreme court of the District was affirmed by a divided court, Morris, J., delivering the opinion of the court (Rec., p. 40) and Alvey, C. J., dissenting (Rec., p. 55). From this judgment of affirmance an appeal is taken to this court.

The principal questions involved in the appeal are:

First. Whether Congress has power to impose taxes upon land in the District of Columbia by way of assessment for special benefits accruing to such lands by reason of the expenditures of public funds for works of public utility.

Second. Whether, if such power exists, the act of September 27, 1890, providing for the acquisition of land for the Rock Creek Park and the levy of assessments upon other lands specially benefited by its establishment, is a valid exercise of the power. (Opin. Morris, J., Rec., top p. 50).

ARGUMENT.

I.

All the questions raised in this case can be solved by an application of the principles settled in the cases of *Shoemaker* v. *The United States* (147 U. S., 282) and *Bauman* v. *Ross* (167 U. S., 548).

In the Shoemaker Case the validity of the Rock Creek Park act was sustained, and the proceedings of the commission in selecting the land, making and filing the map, and condemning the real estate it was unable to purchase was passed upon and upheld by this court. It is true that at the time the Shoemaker Case arose no attempt had been made by the commission to make an assessment for special benefits, but the provisions of the entire act were before the court in the consideration of its constitutionality as a whole. It is difficult to understand how the court could have sustained the validity of the law without approving of the provisions for assessment, which are really an essential part of the scheme, incapable of rejection without impairing the integrity of the law. Certainly the court carefully considered the terms of section six (6), regulating the assessment for benefits and providing a method for paying the costs and expenses of establishing the park. In the statement of the case, prepared by Mr. Justice Shiras, who delivered the opinion of the court, there is the following statement of the provisions of section 6 (p. 286):

> It was made the further duty of the commission, when they had ascertained the amount required to be paid for the land and for expenses, to assess the

same upon the lands, lots, and blocks situated in said District specially benefited by reason of the location and improvement of said park, in proportion to such benefits to said property; and it was provided that if the commission should find that the benefits were not equal to the cost and expenses of the land obtained for the park, they should assess each tract specially benefited to the extent of the benefit thereto. If the proceeds of the assessment exceeded the cost of the park, the excess was to be used in its improvement if such excess should not exceed the amount of ten thousand dollars; any part above tha amount to be refunded ratably. The commission was to give due notice of the time and place of their meeting for the purpose of making such assessment for benefits, and all persons interested might appear and be heard. The assessment being duly made, it became the duty of the commission to apply to the supreme court of the District of Columbia to have it confirmed. The court was given power, after notice duly given to all parties in interest, to hear and determine all matters connected with said assessment, and to revise, correct, amend, and confirm the same, in whole or in part, or order a new assessment, in whole or in part, with or without further notice, or on such notice as it should prescribe. The act also prescribed the mode in which payment of the assessment for benefits should be made after it was confirmed, and provided for the enforcement of such payment in the manner employed in the District for the collection of delinquent taxes. All payments under said assessment were to be made to the Treasurer of the United States, and all money so collected might be paid by the Treasurer, on the order of the commission, to any persons entitled thereto, as compensation for land or services.

> To pay the expenses of inquiry, survey, assessment, cost of lands taken, and all other expenses incidental thereto, the sum of $1,200,000 was appropriated, out of any money in the Treasury not otherwise appropriated, one-half of which, as well as one-half of any sum annually appropriated and expended for the maintenance and improvement of the park, was made a charge upon the revenues of the District of Columbia.

In the opinion of the court, the following language is used, showing that the court considered and sustained the constitutionality of the provisions for an assessment for benefits set forth in this section (bottom p. 302):

> A further objection is made to the validity of the act by reason of the sixth section, which provides for the assessment of benefits resulting from the "location and improvement of said park" upon lands so especially benefited.
>
> The cases heretofore cited to show that the erection of parks in cities is a public use in a constitutional sense, were, most of them, cases in which it was likewise held that it is competent for the legislature, in providing for the cost of such parks, to assess a proportionate part of the cost upon property specially benefited, and we need not repeat the citations.
>
> No special request on the subject of the legal effect of the provisions in respect to special benefits seems to have been made to the court below, and there is no specific assignment of error as to it. Nor does it appear that any person having property actually assessed for special benefits is a party as plaintiff in error. We are therefore relieved from any extended consideration of this feature of the act.

In the subsequent case of *Bauman* v. *Ross*, ably argued and carefully considered, this court, in an elaborate opinion delivered by Mr. Justice Gray, goes into an extended discussion of the authority of Congress to authorize an assessment for benefits on property in the District of Columbia especially benefited by improvements made under what is commonly known as The Highway Extension Act. Every objection urged against the validity of section 6 of the Rock Creek Park Act was presented to the court, considered, and overruled in the case of *Bauman* v. *Ross*. Discussing the validity of the rule of assessment prescribed in The Highway Extension Act, Mr. Justice Gray, speaking for the court, says (167 U. S. bottom p. 591):

> Nor can we entertain any serious doubt as to the rule of assessment which is to govern. The directions that the jury "shall ascertain and determine what property is benefited" by the establishment of the highway and "shall assess against each parcel which it shall find to be so benefited its proper proportional part of" the whole sum directed to be assessed, making due allowance, when part only of a tract has been taken, for any deduction already made in the assessment of damages for such taking, "on account of the benefit to the remainder of the tract," reasonably, if not necessarily, imply that the assessment is to be proportional to the benefit and not to the market value or any other test, and are equivalent to the words in the Rock Creek Park Act directing lands in the District of Columbia to be assessed, "as nearly as may be, in proportion to the benefits resulting to such real

estate." (Act of September 27, 1890, chap. 1001, sec. 6; 26 Stat., 493; *Shoemaker* v. *United States*, above cited.)

It thus appears that this court did consider and sustain the validity of the provisions of section 6 respecting an assessment for benefits in the Shoemaker Case, and in deciding the Bauman Case had in mind the similarity of the provisions in the Highway Extension Act to those in the Rock Creek Park Act.

I shall now proceed to apply the principles laid down in the Shoemaker Case and in the Bauman Case to the provisions of section 6 of the Rock Creek Park Act, to which objections are made in the case before the court.

II.

The establishment of a park in the District of Columbia is a public purpose, for which Congress may authorize land to be purchased and appropriated and the cost thereof assessed upon property especially benefited: *Shoemaker* v. *United States*, 147 U. S., bottom p. 297, bottom p. 302, citing *Brooklyn Park Commissioners* v. *Armstrong*, 45 N. Y., 234; *In re Commissioners of the Central Park*, 63 Barb., 282; *Owners of Ground* v. *Mayor of Albany*, 15 Wend., 374; *Holt* v. *Somerville*, 127 Mass., 408; *Foster* v. *Boston Park Commissioners*, 131 Mass., 225; also 133 Mass., 321; *St. Louis County Court* v. *Griswold*, 58 Mo., 175; *Cook* v. *South Park Commissioners*, 61 Ill., 115; *Kerr* v. *South Park Commissioners*, 117 U. S., 379.

III.

It is contended by the appellees that the Rock Creek Park is not an improvement of local character, but is intended for the benefit and enjoyment of the people of the United States, and that the cost of it should be borne by the people of the United States and not be imposed upon the people of the District of Columbia or upon the owners of adjacent lands alleged to be especially benefited by the establishment of the park.

> But it is for the legislature, and not for the judiciary, to determine whether the expense of a public improvement should be borne by the whole State or by the district of neighborhood immediately benefited. The case, in this respect, comes within the principle upon which this court held that the legislature of Alabama might charge the county of Mobile with the whole cost of an extensive improvement of Mobile Harbor, and, speaking by Mr. Justice Field, said: "the objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole State. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State specially and immediately benefited by the expenditure." *Mobile County* v. *Kimball*, 102 U. S., 691, 703, 704.

The legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, widening, the grading, or the repair of a street to be assessed upon the owners of lands benefited thereby. *Davidson* v. *New Orleans*, 96 U. S., 97; *Hagar* v. *Reclamation District*, 111 U. S., 701; *Spencer* v. *Merchant*, 125 U. S., 345, 355, 356; *Walston* v. *Nevin*, 128 U. S., 578, 582; *Lent* v. *Tillson*, 140 U. S., 316, 328; *Illinois Central Railroad* v. *Decatur*, 147 U. S., 190, 198, 199; *Paulsen* v. *Portland*, 149 U. S., 30. This authority has been repeatedly exercised in the District of Columbia by Congress, with the sanction of this court. *Willard* v. *Presbury*, 14 Wall., 676; *Mattingly* v. *District of Columbia*, 97 U. S., 687; *Shoemaker* v. *United States*, 147 U. S., 282, 286, 302.

The class of lands to be assessed for the purpose may be either determined by the legislature itself by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited. *Spencer* v. *Merchant* and *Shoemaker* v. *United States*, above cited; *Fallbrook District* v. *Bradley*, 164 U. S., 112, 167, 168, 175, 176; *Uhlan* v. *Baltimore*, 165 U. S., 719. See also the very able opinion of the court of appeals of New York, delivered by Judge Ruggles, in *People* v. *Brooklyn*, 4 N. Y., 419, 430. (Justice Shiras's Opin., *Bauman* v. *Ross*, 167 U. S., 589.)

It is objected that the measure of the proposed assessment is not fixed by the law nor determinable by the commission, and for this reason the assessment feature of

the act is incapable of execution. In support of this contention the following language from the opinion of Cox, J. (Rec., bottom p. 28) is relied upon:

> If the court were asked to direct the commissioners by mandamus to discharge the duty devolved upon them by this clause, what direction could the court give? What proportion could it direct the commission to assess upon the property? It seems evident that the clause is too uncertain to be executed either voluntarily by the commission or under compulsion from the court, and they must be held to derive no authority to act under that clause.

The clause, or rather clauses, directing the assessment and defining the sum to be assessed, read as follows (beginning sec. 6):

> The commission having ascertained the cost of the land, including expenses, shall assess such proportion of such cost and expenses upon the lands, lots, and blocks situated in the District of Columbia specially benefited by reason of the location and improvement of said park, as nearly as may be, in proportion to the benefits resulting to such real estate. If said commission shall find that the real estate in said District directly benefited by reason of the location of the park is not benefited to the full extent of the estimated cost and expenses, they shall assess each tract or parcel of land specially benefited to the extent of such benefits as they shall determine the said real estate specially benefited.

In the Shoemaker Case, the meaning and effect of this language is thus stated by this court (p. 286):

> It was made the further duty of the commission, when they had ascertained the amount required to

be paid for the land and for expenses, to assess the same upon the lands, lots, and blocks situated in said District specially benefited by reason of the location and improvement of said park, in proportion to such benefits to said property; and it was provided that if the commission should find that the benefits were not equal to the cost and expenses of the land obtained for the park, they should assess each tract specially benefited to the extent of the benefit thereto.

There is no uncertainty about the intent and meaning of the clauses quoted. If the lands to be assessed have been benefited to the full extent of the ascertained cost and expenses, then the measure of the assessment is the amount of such ascertained cost and expenses; if the real estate to be assessed has not been benefited to the full extent of such ascertained cost and expenses, then the measure of the assessment is the proportion of the ascertained cost and expenses to which the real estate has been specially benefited. A court would have no difficulty in requiring the commission by writ of mandamus to perform the duties imposed upon it by these clauses. The commission would be directed to ascertain the cost of the land for the park, including expenses; to determine next the amount to which the lands specially benefited by the establishment of the park had been benefited, and then to assess this amount upon such lands in the proportion in which they had been benefited by the establishment of the park. If the benefits resulting to the real estate to be assessed should not equal the cost of the park, then only a proportion of this cost

would be assessed, and this proportion would be assessed upon the lands specially benefited as nearly as might be in proportion to the benefits resulting. The unskillful use of a few words can not be used to defeat this provision for assessment. The words "such proportion of" following the words "shall assess" in the first clause can be rejected as surplusage, in view of the provisions of the second clause. The draftsman evidently had in mind, when framing the first clause, that the benefits might not equal the cost of the park, and, therefore, included these words, neglecting, afterwards, when a special provision was made for the assessment of only a proportion of the cost of the park to strike them out. The word "estimated" before "cost and expenses" in the second clause should be read "ascertained." The words are used as equivalents.

IV.

It is objected that the class of lands to be assessed is not defined, or rather that there are conflicting provisions upon this point. The first clause which has been quoted requires the assessment to be made upon lands "specially benefited by reason of the location and improvement of said park;" the second clause requires the assessment to be made upon lands "directly benefited by reason of the location of the park." The following language of Cox, J., is relied upon as presenting in forcible terms this objection (Rec., p. 29):

> There is a further difference to be noted between the two clauses. The assessment under the first clause was to be made with reference to the benefits

resulting from both the *location and improvement*. In the second clause, each tract is to be assessed to the extent of the benefits derived only from the *location* of the park. *At the present time* it is quite plain that no benefits are derived *from the location*, because the adjacent owners of property *have nothing which they had not before*. For this reason, it appears that the commission have declared their intention of assessing with reference to both location and improvement. Their whole authority is derived under this second clause; and that does not authorize them to assess with reference to both *location and improvement*, and so far their proposed assessment is therefore without authority of law.

But if it could be held to authorize such proposed assessment, the standard by which they are to be guided is so uncertain as to make the execution of the law as impossible under this as under the former clause. When a street is by municipal ordinance directed to be opened, graded, paved, or otherwise improved, we all know exactly what is to be done and what the effect will be upon the adjacent property; but there is no law providing for the improvement of the park. No system of improvement has been adopted, no money has been appropriated for the purpose of making improvements, and no one knows that any ever will be appropriated. The only standard which the commissioners would have for estimating benefits with reference to improvements would be found in their imagination as to what may be done at some indefinite time in the future. It is impossible that a just appraisement of benefits could be made on that basis. Here also, if the court were to attempt to enforce the duty charged upon the commissioners, it would find it equally impossible with such proceedings under the first clause, as already suggested.

This objection proceeds upon the assumption that the Rock Creek Park is akin to a public library or an art gallery, erected for the public enjoyment and benefit. There is a distinction to be observed between the Rock Creek Park and a public improvement of a purely artificial character. The Rock Creek Park is a natural park. Such a park is erected, not to change but to preserve the natural condition of the country which it incloses. The ground, the rocks, the streams, the grass, the shrubbery, the trees, all these, as they are, are to be preserved, for they make up the natural beauty of the park. The Rock Creek Park was improved, in a natural and proper sense, when the land composing it was set apart in compact form and dedicated perpetually to the benefit and enjoyment of the public. The segregation of this tract of land, the provisions for preserving its natural condition and beauties, amounted to an improvement of it as a park. No further improvement is necessary, except the construction of certain driveways, bridle paths, and footways to make it more accessible. This is provided for in the seventh section of the act, which imposes upon the Commissioners of the District and Chief of Engineers of the United States Army the duty, after the park has been established, of laying out and preparing roadways and bridle paths to be used for driving and for horseback riding, respectively, and footways for pedestrians.

The benefits resulting to adjacent property by the establishment of the park are benefits resulting from its location and improvement in the sense indicated. The

proximity of "a bit of country" never to be built on, whose natural beauties are to be forever preserved, inevitably adds great value to the real estate in the neighborhood of the Rock Creek Park. Before this park was established a person owning a piece of residence property near it could not tell who would purchase the land now in the park, nor to what use it might be applied. Undesirable neighbors and offensive uses were possible. This possibility affected the value of the land. But with the establishment of the park conditions changed. Where the park is, no undesirable persons can reside; no structures impairing the value of adjacent property can be erected; no occupations or industries of an offensive character can be instituted. All the commission had to consider was the benefits resulting from the establishment of the park, from its location and improvement in that sense. These benefits were present, possible of ascertainment at the time, and it was the duty of the commission to ascertain them and assess the benefited property to that extent.

The commission was not permitted to proceed with the assessment, and there is no complaint before the court based upon what the commission actually did. The commission was stopped by an injunction at the inception of its work of assessment. If the commission, in the exercise of its functions under the law, should adopt an erroneous rule of assessment, and in ascertaining benefits should take into account matters of a purely speculative character, such erroneous action might be reviewed and corrected by a court. It will be time enough

to object to the consideration of purely speculative benefits, benefits only found in the imagination of the commission, when a proper case is presented to the court.

The ascertainment of the lands which are benefited by the location and improvement of the park is left to the commission.

> The question what parcels of lands within the district so ascertained are benefited, and therefore liable to be assessed, might justly and constitutionally, as appears by the cases above cited, be committed by Congress to the determination of the tribunal intrusted with the authority of making this assessment. (Mr. Justice Shiras in *Baumann* v. *Ross*, 167 U. S., bottom p. 591.)

V.

The sum directed by section six to be assessed is readily ascertainable, the class of lands to be assessed is sufficiently defined, the rule of assessment to be followed is easy of comprehension, and expressly approved by this court in *Baumann* v. *Ross*, 167 U. S., top page 592. It remains to consider the objection that the park has been paid for out of the Congressional appropriation, and therefore no assessment can be made; and that if an assessment can be made, it will result probably in not only paying back what the Government has expended, but in covering into the Treasury a considerable additional amount.

This objection is open to the observation that it will be time enough to cross this stream when we come to it. There is no occasion to worry about an excess of money

being paid into the United States Treasury at present. If an unexpected sum should be realized from the assessment, there would be no difficulty in handling and disposing of it in a proper and equitable manner.

But there is no possibility of that happening which counsel and the court below affect to fear. There is no gold mine for the Government in this park scheme. Provision is made for the assessment of the cost of the park on real estate in the District, if there be real estate specially benefited to the extent of such cost. If the benefits do not amount to so much, a proportion of the cost of the park is to be assessed. Time will be necessarily consumed in making and collecting the assessment, but the owners of land purchased or appropriated must be paid at once, so an appropriation of $1,200,000, "or so much thereof as may be necessary," was made "to pay the expenses of inquiry, survey, assessment, cost of land taken, and all other necessary expenses incidental thereto." One-half of this sum, "so much thereof as may be expended," is to be reimbursed to the Treasury of the United States out of the revenue of the District of Columbia. The effect of these various provisions is, that the Government appropriation is evidently used to anticipate the collection of the assessment, and after deducting the assessment when collected from the portion of the appropriation expended, one-half of the balance is to be reimbursed to the Government out of the revenues of the District of Columbia. In other words, if the entire appropriation of $1,200,000 has been paid out for the park and $600,000 is realized from the assessment, this

amount is to be paid into the Treasury, and operates as a virtual repayment to that extent of the expended appropriation. Of the balance of the appropriation, amounting in the supposed case to $600,000, the District will have to pay one-half, or $300,000, reimbursing the Government to that extent. If an erroneous distribution of money as between the Government, the District, and the owners of assessed property should be made, it can be corrected at the proper time.

VI.

The provisions in section 6 for a notice and hearing in the matter of the assessment, first, by the commission when making the assessment, and, second, by the court in confirming the same, constitutes due process of law. (*Bauman* v. *Ross*, 167 U. S., 548, middle page 590, citing *Davidson* v. *New Orleans*, *Spencer* v. *Merchant*, *Walston* v. *Nevin*, *Lent* v. *Tillson*, *Paulsen* v. *Portland*, and *Fallbrook District* v. *Bradley*.)

VII.

When one is satisfied that a statute is vicious in principle and repugnant to the fundamental law, it is not difficult to reach the conclusion that its provisions are impossible of execution. One is apt to lose sight of those salutary rules, so often referred to by this court in sustaining and enforcing the enactments of Congress.

> "Every possible presumption," said Mr. Chief Justice Waite, speaking for the court in *The Sinking Fund Cases*, 99 U. S., 700, 718, "is in favor of the

> validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the Government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Following this rule is the familiar one, that in determining the construction of a law, the court will give that meaning to its language which will sustain instead of defeat its validity, and give effective operation to its provisions, the rule well expressed by Alvey, C. J., in language quoted by this court with approval in *Benanon v. Ross*, 167 U. S., middle p. 596.

> Every reasonable intendment should be indulged in order to maintain the act in its entirety, and if there be any reasonable mode of construction by which the entire act, and every provision thereof, may be sustained, as against a mere plausible construction tending to a contrary result, the former mode of construction must prevail. It is only when no other reasonable construction can be supported that an act of Congress, or any part of it, can be declared to be unconstitutional and void, or invalid for any cause.

An error or mistake in phraseology, manifest upon the face of the statute when read as a whole, may be disregarded or corrected by a court in order to effectuate the evident intention of the legislature.

> When it thus appears beyond doubt that a statute, when read literally as printed, is impossible of execution, or will defeat the plain object of its enactment, or is senseless, or leads to absurd results or consequences, a court is authorized to regard such

> defect as the result of error or mistake, and to put such construction upon the statute as will correct the error or mistake, by carrying out the clear purpose and manifest intention of the legislature. The error or mistake, as well as the proper correction, must appear beyond doubt from the face of the act, or when read in connection with other acts in *pari materia*. (Burket, Judge, in *State ex rel.* v. *Archibald*, 52 O. S. 1, 9, citing many cases.)

In *Lent* v. *Tillson*, 140 U. S., 316,329, this court quotes with approval the following language of the supreme court of California:

> To give the statute the construction contended for would not only defeat the evident purpose, but would make the whole proceeding farcical. And I must confess, it seems to me it requires great industry in going wrong, in view of all the circumstances, to conclude that such can be the meaning. Inapt words certainly are found in the section (sec. 8), but it would not have provided so elaborately for a thorough investigation for grievances if it were not intended that redress should be awarded. The statute has apparently been patched and tinkered after it was first drawn, and incongruous matter injected into the body of it. But it still provides for a full hearing, and that the court may alter and modify.

If it be necessary to effectuate the evident intention of Congress in enacting section six of the Rock Creek Park Act, to reject certain inapt words, inserted by mistake, as for example, the words "such proportion of" following the words "shall assess" in the first clause of the section, and to correct other words used by inadvertence, as

for instance, to change "eight" to "seven" where the section provides, "if the proceeds of assessment exceed the cost of the park the excess shall be used in this improvement, under the direction of the officers named in section *eight*," there being no *section eight* in the act and *section seven* being the one which provides for the permanent board to take charge of the improvement of the park in the construction of roads, bridle paths, and footways, there is ample authority for such action.

It is submitted that the judgments below should be reversed, with instructions to dismiss the bill.

JOHN K. RICHARDS,
Solicitor-General.

DECEMBER 4, 1897.

APPENDIX.

AN ACT authorizing the establishment of a public park in the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a tract of land lying on both sides of Rock Creek, beginning at Klingle Ford Bridge, and running northwardly, following the course of said creek, of a width not less at any point than six hundred feet, nor more than twelve hundred feet, including the bed of the creek, of which not less than two hundred feet shall be on either side of said creek, south of Broad Branch road and Blagden Mill road and of such greater width north of said roads as the commissioners designated in this act may select, shall be secured, as hereinafter set out, and be perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States, to be known by the name of Rock Creek Park: *Provided, however*, That the whole tract so to be selected and condemned under the provisions of this act shall not exceed two thousand acres nor the total cost thereof exceed the amount of money herein appropriated.

SEC. 2. That the Chief of Engineers of the United States Army, the Engineer Commissioner of the District of Columbia, and three citizens to be appointed by the President, by and with the advice and consent of the Senate, be, and they are hereby, created a commission to

select the land for said park, of the quantity and within the limits aforesaid, and to have the same surveyed by the assistant to the said Engineer Commissioner of the District of Columbia in charge of public highways, which said assistant shall also act as executive officer to the said commission.

SEC. 3. That the said commission shall cause to be made an accurate map of said Rock Creek Park, showing the location, quantity, and character of each parcel of private property to be taken for such purpose, with the names of the respective owners inscribed thereon, which map shall be filed and recorded in the public records of the District of Columbia, and from and after the date of filing said map the several tracts and parcels of land embraced in said Rock Creek Park shall be held as condemned for public uses, and the title thereof vested in the United States, subject to the payment of just compensation, to be determined by said commission, and approved by the President of the United States: *Provided*, That such compensation be accepted by the owner or owners of the several parcels of land.

That if the said commission shall be unable by agreement with the respective owners to purchase all the land so selected and condemned within thirty days after such condemnation, at the price approved by the President of the United States, it shall, at the expiration of such period of thirty days, make application to the supreme court of the District of Columbia, by petition, at a general or special term, for an assessment of the value of such land as it has been unable to purchase.

Said petition shall contain a particular description of the property selected and condemned, with the name of the owner or owners thereof, if known, and their residences, as far as the same may be ascertained, together with a copy of the recorded map of the park; and the said court is hereby authorized and required, upon such

application, without delay, to notify the owners and occupants of the land, if known, by personal service, and if unknown, by service by publication, and to ascertain and assess the value of the land so selected and condemned, by appointing three competent and disinterested commissioners to appraise the value or values thereof, and to return the appraisement to the court; and when the value or values of such lands are thus ascertained, and the President of the United States shall decide the same to be reasonable, said value or values shall be paid to the owner or owners, and the United States shall be deemed to have a valid title to said land; and if in any case the owner or owners of any portion of said land shall refuse or neglect, after the appraisement of the cash value of said lands and improvements, to demand or receive the same from said court, upon depositing the appraised value in said court to the credit of such owner or owners, respectively, the fee-simple shall in like manner be vested in the United States.

SEC. 4. That said court may direct the time and manner in which possession of the property condemned shall be taken or delivered, and may, if necessary, enforce any order or issue any process for giving possession.

SEC. 5. That no delay in making an assessment of compensation, or in taking possession, shall be occasioned by any doubt which may arise as to the ownership of the property, or any part thereof, or as to the interests of the respective owners. In such cases the court shall require a deposit of the money allowed as compensation for the whole property or the part in dispute. In all cases as soon as the said commission shall have paid the compensation assessed, or secured its payment by a deposit of money under the order of the court, possession of the property may be taken. All proceedings hereunder shall be in the name of the United States of America and managed by the Commission.

SEC. 6. That the commission having ascertained the cost of the land, including expenses, shall assess such proportion of such cost and expenses upon the lands, lots, and blocks situated in the District of Columbia, specially benefited by reason of the location and improvement of said park, as nearly as may be, in proportion to the benefits resulting to such real estate.

If said commission shall find that the real estate in said District directly benefited by reason of the location of the park is not benefited to the full extent of the estimated cost and expenses, then they shall assess each tract or parcel of land specially benefited to the extent of such benefits as they shall deem the said real estate specially benefited. The commission shall give at least ten days' notice, in one daily newspaper published in the city of Washington, of the time and place of their meeting for the purpose of making such assessment and may adjourn from time to time till the same be completed. In making the assessment the real estate benefited shall be assessed by the description as appears of record in the District on the day of the first meeting; but no error in description shall vitiate the assessment: *Provided*, That the premises are described with substantial accuracy. The commission shall estimate the value of the different parcels of real estate benefited as aforesaid and the amount assessed against each tract or parcel, and enter all in an assessment book. All persons interested may appear and be heard. When the assessment shall be completed it shall be signed by the commission, or a majority (which majority shall have power always to act), and be filed in the office of the clerk of the supreme court of the District of Columbia. The commission shall apply to the court for a confirmation of said assessment, giving at least ten days' notice of the time thereof by publication in one daily newspaper published in the city of Washington, which notice shall state in general terms the subject and the object of the application.

The said court shall have power, after said notice shall have been duly given, to hear and determine all matters connected with said assessment; and may revise, correct, amend, and conform said assessment, in whole or in part, or order a new assessment, in whole or in part, with or without further notice or on such notice as it shall prescribe; but no order for a new assessment in part, or any partial adverse action, shall hinder or delay confirmation of the residue, or collection of the assessment thereon. Confirmation of any part of the assessment shall make the same a lien on the real estate.

The assessment, when confirmed, shall be divided into four equal installments, and may be paid by any party interested in full or in one, two, three, and four years, on or before which times all shall be payable, with six per centum annual interest on all deferred payments. All payments shall be made to the Treasurer of the United States, who shall keep the account as a separate fund. The orders of the court shall be conclusive evidence of the regularity of all previous proceedings necessary to the validity thereof, and of all matters recited in said orders. The clerk of said court shall keep a record of all proceedings in regard to said assessment and confirmation. The commission shall furnish the said clerk with a duplicate of its assessment book, and in both shall be entered any change made or ordered by the court as to any real estate. Such book filed with the clerk when completed and certified shall be prima facie evidence of all facts recited therein. In case assessments are not paid as aforesaid the book of assessments certified by the clerk of the court shall be delivered to the officer charged by law with the duty of collecting delinquent taxes in the District of Columbia, who shall proceed to collect the same as delinquent real estate taxes are collected. No sale for any installment of assessment shall discharge the real estate from any subsequent installment; and proceedings for

subsequent installments shall be as if no default had been made in prior ones.

All money so collected may be paid by the Treasurer on the order of the commission to any persons entitled thereto as compensation for land or services. Such order on the Treasurer shall be signed by a majority of the commission and shall specify fully the purpose for which it is drawn. If the proceeds of assessment exceed the cost of the park the excess shall be used in its improvement, under the direction of the officers named in section *eight*, if such excess shall not exceed the amount of ten thousand dollars. If it shall exceed that amount that part above ten thousand dollars shall be refunded ratably. Public officers performing any duty hereunder shall be allowed such fees and compensation as they would be entitled to in like cases of collecting taxes. The civilian members of the commission shall be allowed ten dollars per day each for each day of actual service. Deeds made to purchasers at sales for delinquent assessments hereunder shall be prima facie evidence of the right of the purchaser, and any one claiming under him, that the real estate was subject to assessment and directly benefited, and that the assessment was regularly made; that the assessment was not paid; that due advertisement had been made; that the grantee in the deed was the purchaser or assignee of the purchaser, and that the sale was conducted legally.

Any judgment for the sale of any real estate for unpaid assessments shall be conclusive evidence of its regularity and validity in all collateral proceedings except when the assessment was actually paid, and the judgment shall estop all persons from raising any objection thereto, or to any sale or deed based thereon, which existed at the date of its rendition, and could have been presented as a defense to the application for such judgment.

To pay the expenses of inquiry, survey, assessment, cost of lands taken, and all other necessary expenses in-

cidental thereto, the sum of one million two hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated: *Provided*, That one-half of said sum of one million two hundred thousand dollars, or so much thereof as may be expended, shall be re-imbursed to the Treasury of the United States out of the revenues of the District of Columbia in four equal annual installments, with interest at the rate of three per centum per annum upon the deferred payments: *And provided further*, That one-half of the sum which shall be annually appropriated and expended for the maintenance and improvement of said lands as a public park shall be charged against and paid out of the revenues of the District of Columbia, in the manner now provided by law in respect to other appropriations for the District of Columbia, and the other half shall be appropriated out of the Treasury of the United States.

SEC. 7. That the public park authorized and established by this act shall be under the joint control of the Commissioners of the District of Columbia and the Chief of Engineers of the United States Army, whose duty it shall be, as soon as practicable, to lay out and prepare roadways and bridle paths, to be used for driving and for horseback riding, respectively, and footways for pedestrians; and whose duty it shall also be to make and publish such regulations as they deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury or spoliation of all timber, animals, or curiosities within said park, and their retention in their natural condition, as nearly as possible.

Approved, September 27, 1890.

No. 164.

Reply Brf. of Atty. Gen.l (Richa
for Appts.

Filed Dec. 11, 1897.

DEC 11 189
JAMES H. McKENNEY,
CLER

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

JOHN M. WILSON AND WILLIAM M. BLACK (successors to William P. Craighill, Charles F. Powell), Henry V. Boynton, Samuel P. Langley, and R. Ross Perry, constituting and composing the commission to select the land for Rock Creek Park, appellants,
v.
AVARILLA LAMBERT AND MARTINA CARR, children and sole heirs-at-law of John Van Riswick, deceased, survivors.

No. 164.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

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No. 164.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

I.

JURISDICTION OF THIS COURT.

Counsel for the appellees, after devoting more than forty pages of his brief to a discussion of the constitutionality of the sixth section of the Rock Creek Park act, suggests, on page 44, that this court may be without juris-

diction to determine that question. He bases his sugg
tion upon the claim that there is no jurisdictional amou
involved, and that the pleadings disclose grounds oth
than the constitutionality of the law upon which t
decrees were based.

In the court below, counsel for all the parties waive
as far as they could, the jurisdictional questions, in ord
that there might be a conclusive determination by th
court of the power of the commission to make the asses
ment. Why does opposing counsel change his attitude
The question of the authority of the commission to asse
for benefits under the sixth section will have to be dete
mined by this court. Why not determine it now?

The reply to this contention is—

First. The decision of the court of appeals was prac
tically based altogether upon the unconstitutionality o
the sixth section. (Rec., pp. 40–55.) The conclusion of a
extended discussion of the constitutionality of the law is
"An assessment that necessarily leads to this conclusion
we are compelled to regard as a violation of the Consti
tution of the United States." (Rec., bottom p. 54.) A
a mere makeweight, the court refers (Rec., bottom p. 54)
to a further reason for holding the law invalid:

> But proceeding one step farther, we find that
> not only is this section violative of the fundamental
> law of the land, but it is likewise so hopelessly
> inconsistent and meaningless that it is impossible to
> determine its sense with any certainty; and conse-
> quently it is impossible to execute it with any pro-
> priety, even if it were not affected with the fatal
> taint of unconstitutionality.

The court does not attempt to construe the section, so there is no question of construction involved, but says:

> It is very evident that this section was passed without much, if any, consideration by Congress. It does not reflect the legislative mind or express the legislative intention, and it is so hopelessly involved in palpable inconsistencies and a maze of meaningless verbiage that *it is impossible to apply to it any of the canons of construction* that a court is authorized to apply in such cases.

This amounts to saying: "This section is vicious in principle and repugnant to the Constitution. It is also so inconsistent and meaningless that it is impossible of execution. For these reasons we will not attempt to enforce it; we declare it null and void; we wipe it off the statute books."

Would the court below have had any difficulty in applying to this act the canons of construction if it had approved of the principle of assessment for benefits and believed the section to be constitutional?

Second. The eighth section of the act of February 9, 1893 (27 Stats., 434), gives this court jurisdiction in error or on appeal in every cause, without regard to the sum involved, "*in which is drawn in question the validity of a treaty or of a statute of or an authority exercised under the United States.*" The validity of a statute means its legal efficacy; its sufficiency in point of law. A statute may be insufficient in point of law and invalid, not only because it violates some provision of the Constitution, but because it is so framed that it is impossible to carry its provisions into force and effect. A statute impossible of execution

is invalid, because it has no force or effect in law. The holding of the court of appeals upon the point that the sixth section of the Rock Creek Park act was impossible of execution, was a finding that it was and is invalid *for that reason*, as well as for the reason that it is repugnant to the Constitution.

I do not admit that the judgment of the court of appeals could be sustained solely upon the second ground stated in its opinion, to wit, that the sixth section is impossible of execution, but if it could be, still there would be drawn in question the validity of this statute of the United States.

Consider the result if this court should refuse to review the decision of an inferior court holding a United States statute invalid because impossible of execution. The court of appeals of the District of Columbia has no power now to nullify a law of the United States on the ground that it is invalid. That authority is reserved to this high tribunal. Neither can a State court abrogate a United States statute by holding it invalid. The question whether a Federal law is or is not invalid can always be carried as a last resort to this court.

But suppose we limit the meaning of invalidity to unconstitutionality, and say that while an inferior court can not pass finally upon the question of unconstitutionality, can not conclusively determine that a Federal law is null and void because repugnant to the Constitution, nevertheless it may declare a law invalid, and thus wipe it off the statute books, by holding that its terms are inconsistent and meaningless, and its provisions impossible of execution. The result is the same—the Federal

w is nullified, and there is no recourse. Would it take ferior courts long to understand *how* to give finality to eir decisions holding Federal statutes invalid? It is t hard to conclude that an unconstitutional law is im- ssible of execution, and a court might honestly couple th its finding that an act is unconstitutional, the con- usion that its language is inconsistent and meaningless, d its provisions impossible of execution. Thus this urt would be effectually ousted of the power of pro- cting the Constitution and enforcing those valid laws ssed by Congress in the execution of its provisions. In this connection, the language of this court, speak- g by Mr. Justice Gray, in *Bauman* v. *Ross* (bottom p. 3), is instructive:

> The power of Congress, exercising the right of eminent domain within the District of Columbia, to provide for the deduction of benefits from the compensation or damages for taking part of a parcel of land and injuring the rest, *does not appear ever to have been judicially questioned until it was denied by a majority of the court of appeals of the District of Columbia within the last two or three years.* *District of Columbia* v. *Prospect Hill Cemetery*, 5 App. D. C., 497; *Maryland and Washington Railway* v. *Hiller*, 8 App. D. C., 289; *District of Columbia* v. *Armes*, 8 App. D. C., 393.
>
> *The position thus assumed by the majority of that court is not only against the uniform course of previous legislation and decision in the District of Columbia, but it is opposed to the great preponderance of the authorities elsewhere.*

hird. The question involved in this case is the author- of the Rock Creek Park Commission to levy an

assessment for benefits. The authority granted the commission is one conferred by act of Congress. It is an authority "exercised under the United States." There is therefore drawn in question in this case the validity of an authority exercised under the United States, and upon this ground this court has jurisdiction.

II.

THE COMMISSION WAS NOT FUNCTUS OFFICIO; IT PROCEEDED TO ASSESS AS SOON AS IT COULD.

In the brief of the appellees it is urged that when the commission set about making the assessment, "not only had the time elapsed for making a valid assessment, but the commission, by surrendering their functions, had disqualified themselves from making it. In other words, they were *functi officiis*."

This is an objection that the commission did not proceed to assess at the proper time. When was it ever held that time is of the essence of an assessment, the benefit of which is to inure to the public? Suppose a board authorized to make an assessment should violate the law and make a bad assessment, would the board thereby become *functus officio*? Certainly not; if it took five years to determine the assessment had the board at the end of that time could make a proper assessment. If the law had mentioned the time when the assessment should be made, the language, in the absence of express provision to the contrary, would be treated as simply directory and not mandatory. The assessment is not made for the benefit of the commission. It is made for

the benefit of the public, in this case the United States and the District of Columbia, and the commission, by no delay, whether intentional or unintentional, could relieve the benefited property holders from paying into the United States Treasury the amount they had received by the enhancement of the value of their real estate through the establishment of the park.

But in point of fact there was no improper delay on the part of the commission. It set about making the assessment just as soon as it was possible to do so, in view of the provisions of the law and the duties devolving upon the commission under it, as the matter of the location and establishment of the park from day to day developed.

The act contemplates that the lands selected, purchased, and condemned for the park shall be paid for, in the first instance, out of the appropriation made by Congress, for it provides:

First, near the end of the first section, that the total cost of the park shall not "exceed the amount of money herein appropriated."

Second, in the third section, that the commission shall endeavor to purchase the land selected for the park, by agreement, and shall pay for the same a just compensation, to be determined by the commission and approved by the President.

Third, near the close of the third section, that after the value of the lands condemned had been ascertained in the proceeding in court, and the President had decided the same to be reasonable, the ascertained compensation

shall be paid to the owner or owners, or deposited in court to their credit, whereupon the fee simple shall be vested in the United States.

All these things had to be done before the land in the park could be definitively selected and condemned, and the title vested in the United States and the park established, so that an assessment became possible.

The commission was obliged: (1) To select the land and make and file a map of the proposed park. (2) To endeavor in good faith to purchase the land by agreement before instituting condemnation proceedings. Of necessity the commission had to pay for land purchased by agreement, and in fact did buy and pay for several tracts in this way out of the appropriation. (3) To proceed to condemn lands which it was unable to purchase by agreement.

Long condemnation proceedings ensued. The appraisements made in court, taken in connection with the cost of land purchased, having exceeded the appropriation, certain tracts on the original map were abandoned, in order that the park might be brought within the cost limit. Of this modification of the map the President approved. With some exceptions, the owners of the tracts remaining within the park limits accepted, and were paid the appraised value of their land. This money, of course, was paid out of the appropriation; there was no other fund available.

The owners of several of the tracts included upon the revised map appealed to the Supreme Court (*Shoemaker* v. *United States*, 147 U. S., 282), and up to the deter-

mination of that appeal no one could say what the ultimate contents of the park as established would be. If this court had reversed the Shoemaker Case, the United States might have abandoned those tracts or a new jury put their value at prohibitory prices.

It thus appears that the park could not be definitively established until every tract within its limits had been ascertained and paid for, and its title acquired; and certainly no court would say that the owners of tracts who at the outset agreed to sell to the United States, and owners of tracts who later accepted the appraised value of their lands, ought to be or could be compelled to await payment until a litigious owner of a tract sought to be condemned should have availed himself of the delay incident to running the gauntlet of all the courts.

In the next place, no benefits could properly be assessed until the park had become finally established. A tract abutting on and overlooking the park would receive more benefits than one not abutting on the park. The original map showed lands abutting whose location with reference to the park was changed by the abandonment of certain tracts and the making of the revised map. If that part of the park upon which a man's tract actually abutted was abandoned by the Government, so that his property no longer fronted on the park, his benefits would be greatly reduced.

Again, take the case of tracts shown within the limits of the park in the original map. If abandoned *pendente lite*, they would be assessable for benefits. If not abandoned, they would not only be nonassessable, but would

have to be paid for. The situation being a shifting one, no assessment for benefits could be properly made until the limits of the park should be finally and irrevocably established. The lands to be assessed could not be determined until that time; neither could the benefits received by the several tracts.

After the decision of the Shoemaker Case, it was ascertained that the appropriation had not been exhausted, so the commission, with the approval of the Attorney-General and the President, extended the limits of the park as shown on the revised map by purchasing more land from the tracts included in the original map and abandoned in the revised one. The view taken by the commission, under the advice of the Attorney-General, was that the various processes, the purchases and condemnations, the making and revising of the map, were tentative, and that the park was not finally and conclusively established until the title to the land within it had been acquired and it turned over to the permanent commission. Until the Shoemaker Case was decided, it was not possible to tell how much the Shoemaker tracts would cost. After that decision these facts became known, and the commission then found that money remained available for the purchase of more land. The Attorney-General thereupon advised the President to approve these further purchases, and the President did so, thus extending the limits of the park as shown on the revised map. Then for the first time were the cost of the land and the expenses "ascertained," and the commission in a situation to proceed with the assessment.

The opinions of the Attorney-General upon the Rock Creek Park act are to be found in Opinions, vol. 20, pp. 67, 129, 326, 377.

JOHN K. RICHARDS,
Solicitor-General.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

JOHN M. WILSON, WILLIAM M. BLACK, HENRY V. BOYNTON, SAMUEL P. LANGLEY, AND R. ROSS PERRY, CONSTITUTING AND COMPOSING THE COMMISSION TO SELECT THE LAND FOR ROCK CREEK PARK, APPELLANTS,

vs.

AVARILLA LAMBERT AND MARTINA CARR, SOLE SURVIVING CHILDREN AND HEIRS-AT-LAW OF JOHN VAN RISWICK, DECEASED, APPELLEES.

BRIEF ON BEHALF OF APPELLEES.

STATEMENT.

Rock Creek park was established pursuant to the provisions of the act of Congress entitled "An act authorizing the establishing of a public park within the District of Columbia," approved September 27, 1890 (26 St., 492). The act consists of seven sections. The first provides for the acquisition by the United States of a certain tract or tracts of land, within certain specified limits, extending along both sides of Rock creek, in the District of Columbia, to be " perpetually

dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States, to be known by the name of Rock Creek park," with the proviso that the whole tract to be acquired should not exceed 2,000 acres nor the total cost thereof the sum of $1,200,000, which sum is thereby appropriated and directed to be paid for the land and for the incidental expenses of its acquisition. The second, third, fourth, and fifth sections prescribe the method of acquiring the land, and were enacted in the exercise of the right of the eminent domain. The sixth section, which is cited, substantially, in the majority opinion of the Court of Appeals, at pages 41 and 42 of the printed Record, exhibits the exercise of a co-ordinate right of sovereignty—*i. e.*, the right of taxation.

It is the sixth section of the act which is submitted to the consideration of the Court on this appeal.

The case of Shoemaker *vs.* The United States, decided in January, 1893, and reported 147 U. S., 282, presented for adjudication, first, the validity of the first five sections of the act, and, secondly, the correctness of certain rulings by the supreme court of the District of Columbia in the course of condemnation proceedings instituted in pursuance of the special jurisdiction conferred upon that court by the third of those sections. The bills of exception in that case in nowise involved adjudication of the assessment feature of the act. It is true that in the argument of the case attention was invited to the purpose disclosed in the sixth section to visit upon the individual property-owners within a limited geographical area the possible entire cost of a public work whose national scope was indicated by its perpetual dedication to the use and enjoyment of the people of the United States with a view to enforce the constitutional objections raised by the record to the preceding five sections of the act. But it was with this view solely that such reference was made and not with any purpose to deny the right of the legislature to assess local benefits in aid of a public local

improvement the direct and immediate effect of which is to confer benefits upon the property assessed. The distinction between such an improvement so specially and directly benefiting the subject of assessment and the national and unsolicited park here provided for was deemed to be obvious. The act is unique and admits of no intendment that the purpose of Congress was the establishing of a public local work in the commonly recognized sense of the term, such as a highway, street, sewer, canal, railroad, bridge, or even a city park; but, on the contrary, *ex vi termini*, a work of national scope, on a national scale, at a national cost, and in the sense of a United States court-house, arsenal, navy yard, post-office, library, and the like. It is therefore respectfully submitted that the observation of the court upon the assessment feature of the act, in the course of the opinion in the Shoemaker case, was broader than the bills of exception warranted and should not be considered as applying to the essentially distinct and distinguishable issues presented on this appeal.

The managing or park commission, created by the second section of the act, are the appellants here. Prior to the decision of Shoemaker's case their proceedings for the condemnation of lands taken had been characterized by the following steps:

April 16, 1891, they filed the map of location, embracing eighty-four (84) distinct parcels of land.

Failing in their negotiations for the purchase of more than five of these eighty-four parcels, and the time for negotiating having expired, on the 20th of May, 1891, they petitioned the supreme court of the District of Columbia for the appointment of three appraisers to assess the values of all the parcels of land embraced within the map of location.

The court, thereupon, in the exercise of the special jurisdiction which had been conferred upon it in that behalf by the third section of the act, appointed the appraisers, as prayed for by the park commission. December 19, 1891,

the appraisers, having completed their inquiry, reported to the court, in detail, their assessment of the value of each separate parcel of land included within the map of location.

This report was thereafterwards duly confirmed by the court.

The commission, finding that the aggregate of the assessed values of lands taken, as reported by the appraisers, together with the expense of condemnation, exceeded the limitation of $1,200,000 prescribed by the act as the total cost of the park, submitted, for the approval of the President, a modification of the area exhibited by the map of location corresponding in value with the total cost as limited by the act. The modification of their work was approved by the President on the 13th day of April, 1892.

It is here observable that at this date—the 13th of April, 1892—the commission had definitely and conclusively ascertained the cost of the land, including expenses. It was at this point in their procedure that the mandate contained in the first clause of the sixth section imperatively applied. The mandate is as follows:

"That the commission, having ascertained the cost of the land, including expenses, shall assess such proportion of such cost and expense upon the lands, lots and blocks situated in the District of Columbia, specially benefited by reason of the location and improvement of said park, as nearly as may be, in proportion to the benefit resulting to such real estate."

If, in a word, the assessment which the sixth section enjoins upon the commission to make was ever practicable and capable of being imposed by reason of resulting benefits to outlying lands from the location and improvement of the park or from its location alone, *then* and *then only* was, assuredly, the time for its legitimate levy, and if the commission declined, as they did, then and there, to make it are we not abundantly justified in claiming that their refusal to do so was equivalent to a tacit admission, aye, to

an open declaration, that no benefits had, in fact, resulted from either the location or the improvement of the park which could be made the object of assessment upon such outlying land?

That the commission did, at that time, decline to make such assessment is shown by their petition to the court on the 19th day of April, 1892, wherein they submit the President's approval of their plan of modified area, and, after referring to the failure of land-owners to call for the payment of the assessed values of their respective parcels of land, pray for an order directing payment, into the registry of the court, of such assessed values out of the only fund available for the purpose—*i. e.*, the $1,200,000 appropriated by the concluding clauses of the sixth section. This the court did, accordingly, on the 24th day of May, 1892. The commission thereafterwards applied for and obtained a rule upon the respondent land-owners requiring them to show cause why the title to the several parcels of land taken should not vest in the United States, and on the 19th day of the same month a special auditor was appointed by the court "to ascertain and report to the court the names of the parties respectively entitled to the appraised values of the tracts of land selected for the park."

At this point Mr. Louis P. Shoemaker, one of the respondents, applied for and was allowed his writ of error, and the record, thereupon presented, formed the basis of the court's affirmative decision of the 16th day of January, 1893.

Thereupon the work of paying the several owners of the parcels of land taken for the park proceeded without other interruption than the delay incident to the examination, by the special auditor, of the integrity of their respective claims until every parcel so taken, without exception, had been paid for in full. This was finally accomplished not later than the month of ——, 1893. From that time the title of the United States to the land within the Rock Creek park, as finally delineated, was conclusively established, as pre-

Title vested in U. S. by decree July 1892

scribed by the fourth section of the act, and the land itself fully paid for out of the $1,200,000 appropriated by the sixth. Further than that, pursuant to the additional requirement of the act in its sixth section, all taxable lands within the District of Columbia have from that date contributed their ratable quota, through the medium of general taxation, to the reimbursement to the Treasury of the United States of one-half of the entire sum of money thus paid for the acquisition of the park, including the attendant expenses, in four annual installments, with interest at the rate of 3 per centum per annum.

In the meantime—and the fact is necessarily conceded—the park has remained in precisely the same condition that it was in at the date of its location. It has undergone no physical change, and the legal change involved in the transfer of title to the United States will hardly be seriously urged as a rational basis for benefit assessment. It is, likewise, an admitted fact that, with the full and entire payment of the cost of the land taken and purchased for the Rock Creek park, and with the discharge and satisfaction of the expense incident thereto, the Rock Creek park was finally and definitely established, and that, with the establishing of the park, it passed by operation of law, as expressed in the seventh section of said act of Congress, under the permanent and joint control of the Commissioners of the District of Columbia and the Chief of Engineers of the United States Army, to the exclusion of the appellants. (R., pp. 6, 35.)

This formal transfer of the park by the appellants as a managing commission, by creation of the third section of the park act, to the Commissioners of the District of Columbia and the Chief of Engineers of the United States Army as a board of permanent control, by designation in the seventh section of the act, took place on the 1st day of January, 1895, or about eighteen months after the lands selected for the park had been fully paid for and the park

itself finally and conclusively established and the title thereto vested in the United States.

When, therefore, the managing commission, on the 5th of January, 1895, set about the work of assessing, not only had the time elapsed for making a valid assessment, but the commission, by surrendering their functions, had disqualified themselves for making it. In other words, they were *functi officiis.*

Notwithstanding the above-recited facts, the appellants, on the 5th of January, 1895, in conformity with previous public advertisement, convened, for the first time, as a board of special assessors, claiming that, under the park act, they had ascertained the cost of the land taken for and now constituting the Rock Creek park, including the expenses of acquiring the said land, and that, acting under the authority of said act, they proposed to assess "such portion of such cost and expenses upon the lands, lots, and blocks, being real estate situated in the said District of Columbia specially benefited by reason of the location and improvement of said Rock Creek park," etc., as appears by the advertisement of said meeting at page 7 of the printed Record.

At this meeting the appellees, by their counsel, filed their formal protest against any proceedings whatsoever looking to the proposed assessment as for benefits. This paper appears at page 19 of the printed Record.

The meeting was subsequently adjourned for the purpose, as announced by the chairman, of taking the opinion of the Attorney General upon the question of the powers and legal right of the commission to proceed in the premises.

The Attorney General, however, declined to advise the appellants on the subject of their legal duties, whereupon they met again on the 19th day of January, 1895, with the avowed purpose of proceeding to assess in accordance with their previous advertisement.

Thereupon, on the same day, the appellees, who own in common the land designated on the recorded map of loca-

tion as parcel No. 16 (which was subsequently released from the proceedings in condemnation), by their counsel, filed their original bill for injunction, which appears at pages 2–17 of the Record.

To this bill a general demurrer was interposed February 5, 1895.

The court below, being of the opinion that the application for preventive relief was premature, by its order passed February 18, 1895, sustained the demurrer "with leave, however, to the complainants to renew their application at a later stage in the proceedings of the defendants, as such commission, by supplemental or other pleadings, as the complainants may be advised, for which purpose jurisdiction is retained by the court of the cause." (R., pp. 18, 19.)

Thereafterwards, on the 27th day of February, 1895, the complainants filed their supplemental bill, wherein they renew the allegations of the original bill, incorporate the same, and aver that since the order of the court above referred to the defendants have proceeded to assess, as for benefits resulting from the location and improvement of the park, and, for that purpose, have met, publicly, from time to time and procured the attendance of persons whose opinions, unsanctioned by oath, they have caused to be reduced to writing, and that at the last preceding meeting, held on the 21st day of February, 1895, they "formally announced that they deemed the aforesaid parcel of land numbered 16, among other lands within a radius of one-quarter of a mile from the park, to be specially benefited by reason of the location of the park, and that it was their determinate purpose to assess said parcel in the proportion and to the extent that they deemed the same to be so specially benefited," in evidence whereof they then and there caused the minute to be made in writing, which appears annexed to said supplemental bill as Exhibit "A" at page 21 of the Record, and that unless restrained from so doing the defendants would forthwith proceed to levy and collect the proposed assessment upon

the aforesaid parcel of land, as for alleged benefits resulting thereto from the location of said Rock Creek park, whereby, since the complainants are wholly without remedy at law, the title to their said real estate will be inevitably clouded, they will suffer irreparable injury in respect to their ownership of said parcel of land, and they will be subjected to a multiplicity of suits by reason of the levy and attempted enforcement of said assessment, and they renew their prayer that the defendants may be enjoined *pendente lite* and perpetually thereafter from levying and collecting such assessment.

Upon this bill the restraining order at page 25 was issued, and upon the hearing, therein provided, the defendants were restrained as prayed, *pendente lite*, by the order which appears upon the same page of the Record, made pursuant to the court's opinion, which, being subsequently reduced to writing, was filed April 16, 1895, and is to be found at page 26 of the Record.

In order to facilitate the answer of defendants and to relieve the legal issues involved from embarrassment, certain averments of fact which counsel deemed immaterial were elided from the supplemental bill by amendment filed March 16, 1895. (R., p. 26.)

The answer to the original and supplemental bills was filed July 24, 1895 (R., pp. 33–36). No material issue of fact is thereby raised save possibly touching the averments in the original bill that no benefits have actually resulted to complainants' land from the establishment of the park, and that no legal *criteria* now exist for the making of assessments.

"They (the defendants) admit that having ascertained the cost of the land taken for said park, including expenses, they have, in the performance of their said duty, and with a view to the assessment of such special benefits in accordance with the requirements of said act of Congress, taken the further steps set forth in said supple-

mental bill, and that, in the performance of the said duty and in the exercise of the power conferred upon them by said act of Congress, they did find and determine that no land within the District of Columbia situated more than one-quarter of a mile in any direction beyond the nearest park limit had been specially benefited by reason of the location and improvement of the park, and that they did further find and determine that a portion of said tract sixteen (16) had been so benefited by the location and improvement of the park, not only by reason of its proximity thereto, but because of its overlook of the said park; and they admit that said Exhibit 'A' to said supplemental bill is a correct extract from the minutes of the proceedings of these defendants; and they further admit that unless finally restrained by the order and decree of this honorable court they will further proceed in ascertaining and determining what lands, within the said quarter-mile limit, have been so specially benefited and make assessments thereon agreeably to the said act of Congress."

The answer is coupled with a demurrer to paragraphs 11 and 12 of the original bill "and to so much of paragraphs 14 and 15 thereof as is not above answered and to such portions generally of the said supplemental bill and original bill as are not above answered."

The replication was filed simultaneously with the answer (R., p. 36), and the cause being set for hearing at the same time, and subsequently submitted upon the pleadings without further argument, the court below passed its final decree perpetuating the injunction on the 30th day of September, 1895 (R., pp. 37, 38), from which the appellants appealed.

The cause having been assigned for hearing by the Court of Appeals as for the 17th of February, 1896 (R., p. 39), was, after full argument submitted for the decree of that court. (R., pp. 39, 40.)

Thereupon a majority of the court, consisting of Mr. Justice Morris and Mr. Justice Shepard, united to affirm the decree of Mr. Justice Cox at special term in an opinion the text of which appears at pages 40-55 of the Record.

The dissenting opinion of Mr. Chief Justice Alvey appears at pp. 55–56 of the Record.

From the final decree (R., p. 60), which was rendered in conformity with the opinion of the court, the appellants then and there appealed.

POINTS AND AUTHORITIES.

Jurisdiction.

Reference to the proceedings of the appellants, sitting as a board of assessors, embodied in Exhibit "A," annexed to the supplemental bill (R., p. 21), would seem to preclude the assumption that the jurisdiction of the lower court will be seriously questioned by them at the hearing of this cause. In the absence of their brief, however, doubt on this point cannot be effectually resolved at this time. The first meeting, on the 5th day of January, 1895, was adjourned to take the advice of the Attorney General touching the legality of their proposed assessment. This advice the Attorney General declined to give, because, it may be assumed, it was not within the scope of his official duty to do so. Further meeting of the board was delayed by the restraining order of January 19, issued simultaneously with the filing of the original bill, until after the 18th day of February, 1895, when the order was rescinded, with leave to renew it at a later stage in the proceedings for assessment as complainants might be advised, jurisdiction of the cause being for that purpose then and there retained (R., p. 18). It is worthy of note that no obstacle existed, at this stage in the proceedings, to the exercise by the appellants of their right to apply to the court for a construction of the sixth section of the act in question and its adjudication as to, first, the existence of and, secondly, the limitations upon their power to assess under its provisions. Had they seen fit to do this, can it be doubted that they would have invoked the same forum to which the appellees

had already applied and through the medium of a bill in equity? How else could they have proceeded in view of the purely common-law jurisdiction which is specially conferred upon the supreme court of the District of Columbia for the revision of the assessment provided for by the sixth section of the park act? There was surely nothing in the jurisdiction, thus specially conferred upon that court to act as a board of supervisors, which would justify it in passing upon either the validity or the sufficiency of the authority to assess which it is sought by the sixth section to impose upon the subordinate board of assessors. This would seem to have been the view which the latter took of the matter and which apparently influenced them to avail of the pending proceedings in order to secure a judicial construction of the power to assess. The excerpt from the proceedings at the meeting of February 21, 1895, admits of no other interpretation. The determinate and final designation therein made of the land of the appellees as the subject of assessment, coupled with the explicit declaration that such assessment was, then and there, made in order to conciliate doubts of the court's jurisdiction of the pending proceedings, operated as a complete waiver of unessential details in the process of levying the assessment and indicated their assent to the jurisdiction of the court in the pending proceedings.

It is not claimed, of course, that such assent would be competent to confer a jurisdiction which otherwise does not exist. The fact that it appears of record is only referred to for the purpose of emphasizing the contention that had the appellants, influenced by the motives which induced them to apply for advice to the Attorney General, desired to obtain a judicial interpretation of their power to make this assessment, they must have addressed themselves, through the medium of a bill, to the equity court, and that it is presumable they would have done so had not the pending proceedings afforded them a convenient channel for securing as defendants the instruction which they might otherwise

have sought as complainants. The reason for seeking such authoritative counsel would seem to have been cogent. Ever since the cost of the land taken for the park, including expenses, had been ascertained—provisionally in December, 1891, on the report of the appraisers, and finally in January, 1892, upon the ratification by the court of that report—and ever since the President's approval, on the 13th of April, 1892, of the values which had been fixed by the appraisers, the mandate to assess, as for benefits resulting from location and improvement of the park, had rested upon the appellants. The only purpose, however, to which the proceeds or avails of such special assessment could be applied under the park act was the payment to the owners for lands actually taken, not the repayment to somebody else of moneys which had been already applied to the purpose. Hence the proper time for assessing was, obviously, the time when the lands were taken and the cost ascertained—*i. e.*, not later than the summer of 1892. At that time, however, no possible benefits had resulted from the mere "taking" of the land for the Rock Creek park. The nature, form, and condition of the land remained as it had done during the previous century. It had undergone no physical change, whatever, and it will not be contended that the legal change involved in the transfer of title to the United States was a benefit, or, if a benefit, such a tangible one as would furnish criterion for assessment upon any known principle of the law of eminent domain. If no substantial benefit had resulted at that time from the *location* of the park, still less could any benefit have been predicated of its *improvement*, since no improvement had in fact been made. The landowners, however, were to be paid, and, until they should have been paid, the park could not be said to have been fully established. In this dilemma the appellants, at a single stroke, severed the Gordian knot. In the absence of all ground for special assessment they had recourse, in the first instance, to the $1,200,000 which had been appropriated by

the act for the purpose, apparently, of supplying such deficiencies as might have existed in the prescribed assessment. Whether they were strictly justified in doing this by a technical interpretation of the language of the act cannot now be a subject of inquiry. Certain it is that they felt compelled to do so in order to pay for the park, and that, in so doing, they tacitly, but no less emphatically, admitted their inability to conform to the assessment mandate of the sixth section. This mandate, however, made still more impossible of execution by the changed condition wrought by intervening years, remains to oppress them, and must continue to do so until they shall have been relieved by judicial fiat of the burden which it imposes. The question is therefore fairly presented, "How shall this relief be secured? Can it be done in the exercise of its general jurisdiction by a court of equity, or can it only be afforded by the limited judicial agency sought to be created by the sixth section of the act for the supervision of the proposed work of the appellants as a board of subordinate assessors? It would seem that the bare statement of the question carries with it its appropriate answer.

It is merely axiomatic to say that a court cannot be ousted of its jurisdiction save by the use of express and prohibiting terms. No such terms are used in the park act with reference to the equity court. It is no less axiomatic to affirm that such terms cannot be supplied by implication. When, therefore, the act confers upon the supreme court of the District of Columbia the power, after notice shall have been duly given, "to hear and determine all matters connected with said assessment," it is clearly the grant of a special jurisdiction in aid of its newly created and equally special supervising function over the proposed assessment, and is, in no sense, a limitation upon the subsisting general jurisdiction of that court or any of its branches. The specific scope and narrow bounds of this special jurisdiction, as well as its non-interference with the court's general jurisdiction, is

abundantly evident from the next succeeding clause: "and may revise, correct, amend and confirm said assessment in whole or in part, or order a new assessment in whole or in part, with or without further notice, or on such notice as it shall prescribe." In a word, the court is here created, *pro hac vice*, a supervising or appellate board of assessors with power "to regulate the assessment proceedings, to rectify errors, modify rulings, annul and order new assessments." Is there anything in this language to oust the equity court of its jurisdiction to grant preventive relief upon any one of the recognized grounds of its intervention? The objection to the jurisdiction based on this ground is effectually disposed of by the Court of Appeals, in the course of its opinion, at pages 48, 49 of the Record.

As indicated by that opinion, the like special jurisdiction over the proceedings for the acquisition of park lands was conferred upon the supreme court of the District of Columbia by the third section of the act. But this special grant in nowise interfered with the allowance of the writ of error to review the rulings of the court upon the application of Mr. Louis P. Shoemaker. There is even greater need of the right to invoke the general jurisdiction of the court in cases arising under the sixth section, since the latter undertakes to cut off, absolutely, the right of appeal from the special jurisdiction which it confers upon the supreme court of the District of Columbia by ordering that "the orders of the court shall be conclusive evidence of all previous proceedings necessary to the validity thereof, and the matters recited in said orders." The position taken by the majority of the Court of Appeals upon this point is amply sustained by the reasoning of the court in Ames *vs.* Kansas, 111 U. S., 468, where the doctrine upon the subject is laid down in the words of Chief Justice Taney in Gittings *vs.* Crawford, Taney's Dec., 1–9, as follows:

"Grant of jurisdiction over a certain subject-matter to one court does not of itself imply that jurisdiction is to be exclusive."

The Court of Appeals disposed no less effectively of the jurisdictional objection based upon the section 3224 of the Revised Statutes of the United States (R., p. 45). It is not believed that anything can be added to the cogency of the court's reasoning on those several points.

If, therefore, there be nothing in the special jurisdiction sought to be conferred by the act upon the supreme court of the District of Columbia in aid of its superadded function of revisory assessment to oust the general equitable jurisdiction of that court, and if the public policy designed to be subserved by section 3224 of the Revised Statutes is not in reality infringed by this proceeding, it remains to be considered under the head of jurisdiction whether the case presented by the appellees is such as to warrant the exercise, in their behalf, of the preventive agency of a court of equity.

To the convincing statement of principle and authority by the Court of Appeals at pages 46–49 of the Record but little remains to be added upon this subject.

The action of the managing commission between the filing of the original and of the supplemental bills would seem to have resolved effectually all doubt touching the appellee's claim to equitable relief. From the open threat to assess, generally, as for benefits the commission, in the interval between the filing of the two pleadings, proceeded to designate the specific land of the appellees as a particular subject of such assessment, and declared in a manner the most formal, public, and authoritative:

1st. That such land is actually benefited; and—

2d. That it is their fixed and determinate purpose, unless judicially restrained therefrom, to levy thereon and to collect an assessment as for such benefit—

And that this assessment shall be as for benefits resulting from the location *and improvement* of the Rock Creek park. (R., pp. 22, 36.)

It is true the final step in the *mere process* of assessing has

not been taken, but the no less determinate and conclusive act—the appropriation of the land by designation—has been performed. The cloud has been imposed. Unless dispelled by judicial intervention the lien will surely follow. It matters not how intangible the supposed benefit is nor how difficult it may be to reduce it to the prosaic standard of dollars and cents. Whether it consists, as in this case it is said to consist, of a prospect or view, or whether it consists, as it might consist, of a favorably disposed and enjoyable echo, the judgment of the appellants is conclusive and impositive of that degree of restriction upon the owners' right of property which, by the unanimous current of judicial decision, entitles him to the preventive agency of a court of equity. The purely æsthetical and sentimental consideration which gives value to a prospect of the sylvan beauties of the Rock Creek valley may be, and doubtless is, as little capable of exact estimation as would be the value of an echo that might prolong the dulcet melody of birds within the park. The fact, however, that such view or such echo has been declared, authoritatively, to be a benefit—a statutable benefit if you will—resulting from the location and improvement of the park, and that it is and will be the object of assessment and of levy unless judicial restraint be imposed, at this intervening step in the process, is, we submit, in the light of the authorities, ample ground for the interposition of this court.

Legal redress waits upon the stroke, but equity interposes to stay the descending blow.

That equity will prevent threatened invasion of property right in cases of waste, of trespass, and of nuisance, see—

Story's Eq. Jur., secs. 910–929.

Equity will enjoin collection of illegal tax.

Cummings *vs.* National Bank, 101 U. S., 153, 157, 158.

"Even the cloud cast upon his title by a tax under which a sale could be made would be a grievance which would entitle him to go into a court of equity for relief."

Union Pacific R. R. Co. *vs.* Cheyenne, 113 U. S., 516.

"And in such case of damage, either existing or apprehended, equity will interpose for relief even during the progress of the proceedings before sale."

Lyon *vs.* Alley, 130 U. S., 177, 187.

See also—

Gage *vs.* Kauffman, 133 U. S., 471.

Rich *vs.* Braxton, 158 U. S., 375, 407.

The Court of Appeals well says, in the light of these decisions:

"The removal of a cloud from the title to land is, therefore, a well-recognized ground of equity jurisdiction, when such cloud is the result of illegal taxation. The prevention of such a cloud is equally recognized. Prevention and removal are equally within the domain of the remedial processes of equity." (R., pp. 46–47.)

The language of the sixth section is:

"Deeds made to purchasers at sales for delinquent assessments hereunder shall be *prima facie* evidence of the right of the purchaser, and any one claiming under him, that the real estate was subject to assessment and directly benefited, and that the assessment was regularly made; that the assessment was not paid; that due advertisement had been given, that the grantee in the deed was the purchaser or assignee of the purchaser, and that the sale was conducted legally."

The Court, speaking by Mr. Justice Harlan, in Rich *vs.* Braxton, *supra*, says:

"Mr. Pomeroy in his treatise on Equity Jurisprudence * * * correctly says that equity will interpose when deeds, certificates, and other instruments given on sales for taxes are made by statute *prima facie* evidence of the reg-

ularity of proceedings connected with the assessments and sales (3 Pomeroy's Eq. Jur., sec. 1399, and note 1, p. 437, and authorities there cited), and this view is sustained by numerous adjudged cases."

Where public officers threaten to appropriate private property to a publi, use in violation of law, the person to whom injury is threatened may have an injunction to restrain the commission of such illegal act.

Smart *vs.* Hart, 75 Wis., 471 (1889).

Equity may enjoin *a proposed illegal assessment.*

Baldwin *vs.* ?hine, 84 Ky., 510.

The attention of the Court is particularly invited to this case.

Per Curiam: In De Witt *vs.* Van Schoyk *et al.*, 110 N. Y., 7, 11:

"Moreover, the acts of the defendant are in derogation of the plaintiff's title, and, being calculated to injure her in that respect, would sustain an injunction, though no damage had actually happened. To remove a cloud upon title is a well-recognized head of equity jurisdiction, and the court will in like manner interfere to restrain a defendant from proceeding in an illegal act which if completed will necessarily cast a cloud upon that title and naturally diminish its value."

To the same effect is the well-reasoned case of Oakley *vs.* Trustees of Williamsburg, 6 Paige Ch., 262. Decision by Gray, C. J.:

"If the court may, to prevent litigation, expense, and vexation, entertain jurisdiction to remove a cloud, no reason is perceived why it may not be exercised to prevent the creation of such a cloud."

Groves *vs.* Webber, 72 Ill., 606, 607.

The court say in Bishop *vs.* Moorman, 98 Ind., 1:

"Our decisions uniformly hold that a land-owner may restrain an officer from doing, under color of official authority, an act that may injure the market value of his title by clouding it. This principle has found most frequent application in the case of threatened sales for taxes."

A court of chancery will restrain by injunction a threatened levy of execution upon land which is not legally subject to such a levy, and thus prevent a cloud upon the title, without compelling the owner of the land to wait until the levy had been completed, and then admit himself to be disseised, in order to maintain a writ of entry.

O'Hare *vs.* Downing, 130 Mass., 16–19, citing Clouston *vs.* Shearer, 99 Mass., 209; Hinchley *vs.* Creany, 118 Mass., 595; Rossell *vs.* Deshon, 124 Mass., 342, and Tucker *vs.* Kenniston, 47 N. H., 267.

The Court's attention is especially invited to the last-cited case of Tucker *vs.* Kenniston, as being directly in point and thoroughly well reasoned.

In every instance where relief by injunction has been denied it will be found that plaintiff had not only an adequate legal remedy and presented no claim for equitable intervention, but sought to obstruct the State or municipality in the collection of the public revenue. This grave consideration of public policy is absent from this case. Here the fund sought to be collected could not be used, if collected, for revenue. It must be paid directly to the Treasurer of the United States and kept by him as a separate fund. The sole object for which so much as one cent of it could be expended under the act would be the purchase of lands which have already been paid for in the acquisition of the park. Not one mill could be appropriated towards the reimbursement of the United States for the $1,200,000 or such proportion of it as has been expended for the payment of land and

services, or for any other purpose whatever than the one named. So far, therefore, from any public policy being subserved by the collection of this impracticable tax, the Government is bound by every consideration of justice to the tax-payer to withhold its hand from such a useless appropriation of his property, and the Court is constrained by a like consideration to prevent such criminal perversion of the sovereign power of taxation. The subject is well discussed in this connection by the court in deciding Alexander *vs.* District of Columbia, 2 MacA., 562.

To these citations may be added the exhaustive opinion of the Court of Appeals, speaking through Mr. Justice Morris, at pages 40–58 of the Record.

II.

THE POWER TO ASSESS.

This is to be considered in reference—

First. To the validity of its alleged source—*i. e.*, the sixth section of the act of September 27, 1890.

Secondly. To the sufficiency of its supposed grant—*i. e.*, the language or terms of that section.

Thirdly. To the propriety of its proposed exercise—*i. e.*, after the interval that has elapsed since the cost of the land taken and expenses were ascertained, to wit, December 19, 1891.

For if the section of the act in question be not reconcilable equally with the spirit and letter of the Constitution,

Or, if, being constitutional, it fails to delegate, effectively and intelligently, the power to assess which is here claimed,

Or, if the power be valid in its inception and be appropriately imposed, but if the conditions for its present exercise do not exist,

It is confidently submitted that, on any of these hypotheses, the attempt of the appellants to further proceed with the assessment, as for benefit to the appellees' land, should be restrained and the decree of the Court of Appeals affirming the order of Mr. Justice Cox should be, in its turn, affirmed.

a.

As to the validity of the sixth section:

Power to legislate exclusively for the District of Columbia is conferred by the Constitution, article I, section 8, clause 17, upon Congress. The only express limitation upon its exercise in the case of private property is to be found in the fifth amendment in the words: "Nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

In its exercise Congress acts as the legislature of the Union.

Cohens *vs.* Va., 6 Wheat., 424.

It was held in Loughborough *vs.* Blake, 5 Wheat., 317, that this includes the power of taxation. It is well recognized that the Constitution affords the full measure of powers exercisable by the Government, and that congressional legislation can only be in effectuation of the powers thereby expressly granted or necessarily implied. Fundamental principles of justice, uniformity, and right reason are the tests of the validity of legislation in both instances. For example, it does not require constitutional prohibition to invalidate an act of Congress which on any pretext whatever would deprive one citizen of his property to enrich another nor which would charge the nation at large for the expense of maintaining a single individual nor a single individual with the burden of providing for the maintenance of an entire community. For the same reason it must be

violative of every canon of constitutional construction to claim that for the embellishment of any part of the District of Columbia and the enjoyment of a certain proportion of its inhabitants only, as for the erection of a market-house, theater, or circus, a direct tax should be levied in the only manner prescribed by the Constitution for levying such tax—*i. e.*, upon the States on a censual basis. As little will it consist with organic law that the people of the District of Columbia, or any proportionate part thereof, should be required to defray the cost of a work which is expressly declared to be perpetually dedicated to the use and enjoyment of the people of the United States.

And an act which undertakes to effect such a purpose by levying a tax exclusively upon a fractional part of the land within the District of Columbia violates the express provisions of article I, section 2, clause 3, of the Constitution, which prescribes that direct taxes shall be apportioned among the several States according to their respective numbers and prohibits, in section 9, clause 4, of the same article, their being levied in any other way.

In other words, the object of the proposed tax being in its essence and being, moreover, declared to be national, such tax, to be constitutional, must be levied upon the nation at large and upon the constitutional basis of censual apportionment. While the Congress, by virtue of its power of exclusive legislation, unquestionably taxes the people and the land of the District of Columbia, this can only be done, legitimately, within the limitations imposed by the subjects and the objects of municipal administration, save only when, in aid of a national purpose, it becomes necessary to include the property within the District of Columbia within the purview of direct taxation based upon the entire representative population of the States, Territories, and the District, as exhibited by the last preceding census.

If the validity of the sixth section be doubtful, it is because the land of individuals within a limited area in proximity

to a national park—*i. e.*, within a radius of one-quarter of a mile in every direction therefrom—is thereby subjected to the possible burden of its entire cost. Herein the case differs essentially from that of The County of Mobile *vs.* Kimball, 102 U. S., 703, and like cases, where the inhabitants of a subordinate division and political agency of a State have been made to respond to a bonded indebtedness imposed to defray the cost of a work of prime utility which, besides being especially beneficial to themselves, is measurably so to the State at large. Herein, also, this legislation differs from all other legislation on the subject of taxation, whether State or Federal, that has preceded it, including the highway act which was lately the subject of the Court's adjudication in Bauman *vs.* Ross, 167 U. S., 548, for it is to be noted that the object here is general and, in a national sense, public, not special, and, in a modified sense, local; that it is imposed upon, not solicited, by the people, who are called upon to pay for it; that it is ornamental and not, in the economic sense of the term, useful, and that it invests those who are taxed for it with no title to the park nor right to any exceptional easement therein or thereover. It is observable, too, that the Court, in animadverting upon the State legislation in Mobile *vs.* Kimball, was evidently impressed by the harshness and apparent inequality of the burden thereby imposed upon the tax-payers of Mobile county, who possess, however, as the Court does not fail to remark, a potential form of redress (denied to the less favored residents of the District of Columbia) in the exercise of the corrective right of suffrage. This case cannot, however, be cited as authority upon this point, since the question as there raised was not a Federal one, but related, solely, to the conformity of State legislation with the constitution of Alabama.

But, as I have said, the objection here urged and fully sanctioned by the declaration contained in the first section of the act is broader than that which was advanced for the first time and extra-jurisdictionally in this Court in Mobile

vs. Kimball, and justifies the energetic language of Judge Cooley in his work on Taxation, at pp. 143, 144:

"If a single locality were to assume to tax itself or the State were to undertake to tax it for the construction of a State work or the erection of a State building, no one could hesitate for a moment in saying there was no such right, and that there could be none so long as taxation by the fundamental law is required to be laid by fixed rules and is not subject to the arbitrary caprice of legislative bodies. A county has, therefore, no constitutional authority to lay tax for a county building on a part of its towns only; neither has it authority, when it has contracted a debt for a county purpose, to levy a tax for the satisfaction of the debt on such parts of the towns only as its governing board may think ought in equity to pay it. The rule would be the same if a tax were levied for proper local purposes and the corporation were then to undertake or the State were to require its application to purposes not purely local."

Just previously, page 4, the same learned commentator, in reference to this subject, says:

"The Federal Constitution recognized this principle in the provision it makes to prevent the Federal Government from indirectly imposing its support upon one or more of the States to the relief of others."

Art. I, sec. 8, clause 1; sec. 9, clauses 4 and 5.
See, also, Sharswood, J., in Hammett *vs.* Philadelphia, 65 Pa. St., 146, 151.
People *vs.* Detroit, 28 Mich., 228.

To the same effect are People *vs.* Parks, 58 Col., 624; State *vs.* Leffingwell, 54 Mo., 458; Bromley *vs.* Reynolds, 2 Utah, 525; *In re* Washington Avenue, 69 Pa. St., 352, approving Hammett *vs.* Philadelphia, 65 Pa. St.

Redfield, J., in Allen *vs.* Drew, 44 Vt., 174–188, uses the following language:

"We have no doubt that a local assessment may so far transcend the limits of equality and reason that its exaction would cease to be a tax or contribution to a common bur-

den and become extortion and confiscation. In that case it would be the duty of the court to protect the citizen from robbery under color of a better name."

Equally emphatic is the language of the court in Louisville *vs.* Rolling Mill Co., 3 Bush, 416.

The closest analogy that I have been able to find to the legislation under consideration is that which formed the subject of controversy in The State *vs.* Leffingwell, 54 Mo., 457, from which I quote as follows:

"But there is another point which remains to be noticed. By the law the park is set apart for the free use and enjoyment of the public forever, and it is declared to be of great importance to the city of St. Louis, conducive alike to the dignity and character of the city and the recreation, health, and enjoyment of its inhabitants, yet, strange as it may appear, neither the people themselves nor the inhabitants of the city of St. Louis, for whose especial benefit it is created, are taxed one cent for its establishment, but the exclusive privilege of paying nearly one and a quarter millions of dollars is cast upon a few citizens who are inhabitants of the district. *Nothing is better settled than that special taxation for objects that are general and public is illegal.* In the case of Wells *vs.* The City of Weston (22 Mo., 384) it was decided that the legislature could not authorize a municipal corporation to tax, for its own local support, lands lying beyond the corporation limits."

"Admit this principle" (that people outside the city for which a park is created may be specially taxed to make the said park) "and it would be perfectly competent for the legislature to pass a special act authorizing the building a court-house for the use of the whole county and assessing the cost of construction against the few individuals who own property immediately surrounding the court-house square. Thus we have the broad pretension set up of justifying a special taxation for objects which are avowed to be general and not local. Local assessments are constitutional only when imposed to pay for local improvements conferring special benefits. Uphold this law and the time will probably come when it will be deemed advisable to provide statuary and other costly adornments for the park. There

is left nothing to hinder their being provided for in the same way. The legislature has no power to take the money of one man and transmit it to another, nor can it select a particular township and say that it shall pay all the taxes for the county, nor take a county and make it assume the taxes for the whole State; yet that is precisely the principle that must be established to sustain this act."

Since the decision by the Court of Appeals this Court has decided Bauman *vs.* Ross, wherein one of the contentions was that in view of the magnitude of the scheme of improvement therein involved the attempt to enforce its payment by special assessment was an invalid exercise of legislative power. The difference between the two cases is, however, essential and must be obvious. The improvement there contemplated was exclusively local in its character and impositive of direct local benefit. Here the work is just as essentially national, and so declared to be, and the resulting benefits are obviously indirect, public, and relative, and in no degree direct, local, and positive.

The view entertained upon this point by the learned judge who heard the case at special term is set forth with his accustomed force and clearness in the latter part of his opinion at pages 31, 32 of the Record. He demonstrates therein the consistency of the court's dictum in the case of County of Mobile *vs.* Kimball, 102 U. S., 691, with the doctrine for which we here contend, viz., that while a subordinate community in a State, such as a county, may be required to defray the expense of an improvement which, besides being peculiarly beneficial to itself, is largely so to the entire State, it would contravene the spirit, if not the letter, of constitutional guaranty to subject a restricted area (*i. e.*, abutting lands) or a limited number of individuals to a similarly exclusive burden or charge.

On the hearing of the cause below it was urged on behalf of appellants, and it will doubtless be again urged here, that

the validity of the sixth section of the act was affirmed by this Court in Shoemaker *vs.* U. S., 147 U. S., 282.

If this contention be correct, then the validity of the sixth section is no longer an open question, and was not an open question at the date of the successive decrees by the supreme court of the District of Columbia and by the Court of Appeals of the District of Columbia. Those decrees were based, however, upon other conclusions than that involving the validity of this section and upon conclusions which were equally determinative of the rights in controversy—*ex. gr.*, that the section in question is impossible of execution; that the assessment is incapable of levy; that the time has passed for making it; that the occasion for making it has been superseded by payment already made for lands taken, etc., no one of which affords the essential basis for the exercise of its appellate jurisdiction by this Court in the absence of any dispute involving the sum of $5,000 or upward, as required by the eighth section of the act of Congress of February 9, 1893, establishing the Court of Appeals of the District of Columbia.

It follows, therefore, that, if the position of the appellants be well taken, the appellate jurisdiction of the Court has been erroneously invoked by them, and the appeal should be dismissed.

b.

As to the sufficiency of the grant of the power to assess:

This is determinable upon (1) the interpretation and (2) the construction of the sixth section of the act.

The act exhibits the attempted exercise of two distinct and sovereign powers, as, first, of the eminent domain (secs. 1–5), and, secondly, of taxation under the guise of benefit assessments (sec. 6). By virtue of the former the park has been established. It is now sought to *duplicate its payment* by the latter.

In the first section Congress indicates the purpose of the act to be the establishing of a public park or pleasure ground for the benefit and enjoyment of the people of the United States, the extent whereof shall not exceed 2,000 acres, nor the cost the amount thereinafter appropriated.

The sixth section provides that "the commission (appellants), having ascertained the cost of the land, including expenses, shall assess such proportion of such cost and expense upon the lands, lots, and blocks situated in the District of Columbia specially benefited by reason of the location and improvement of said park, as nearly as may be, in proportion to the benefits resulting to such real estate;" and, further—

"If said commission shall find that the real estate in said District directly benefited by reason of the location of the park is not benefited to the full extent of the estimated cost and expenses, then they shall assess each tract or parcel of land specially benefited as they shall deem the said real estate specially benefited."

The following analysis of the sixth section will serve to show the impracticable character of the duties which are thereby assigned to the appellants and the consequently ineffectual nature of such assessment as they might seek to impose by virtue thereof.

The analysis naturally respects—

1. The time when the assessment shall be made.
2. Its purpose.
3. Its objects.
4. Its subjects.
5. Its procedure.
6. Its scope and effect.

The time of assessment is made to coincide with the ascertainment by the commission of "the cost of the land, including expenses." It is conceded by the answer that the cost of all land, purchased as well as condemned, was ascer-

tained upon the return to the court of the appraisers' report on the 19th day of December, 1891, and it is matter of proper assumption that the expenses, being the subject of ready computation by the commission themselves, must have been ascertainable, if not ascertained, at that time.

The purpose of the assessment is declared to be, alternatively, either the discharge or satisfaction of an undesignated "proportion of *such* cost and expenses" or "the full extent of the *estimated* cost and expenses."

The indicated objects are benefits resulting by reason of the location and improvement of the park to the following enumerated subjects, viz., "lands, lots, and blocks situated in the District of Columbia."

The prescribed procedure contemplates application to the supreme court of the District of Columbia for confirmation and consequent lien; the division of the assessment, when confirmed, into four parts, payable annually, with interest; the payment thereof to the Treasurer of the United States and its custody by him as a separate fund; the conclusive effect of the court's order upon the regularity of the assessment and the *prima facie* evidence of facts set out in the assessment book; the collection of delinquent assessments by the officer having such matters in charge on receipt of assessment book; the payment of "all moneys so collected" by the treasurer on order of the commission, *as compensation for land or services;* the possible assessment and collection of $10,000 in excess of the cost of lands, including expenses, and its use in the improvement of the park under direction of officers named in section 8, there being no such section in the act; the ratable refunding of any excess of assessment over the excess of $10,000 (to whom, when, or how not mentioned); the allowance to public officers performing duties thereunder of such fees and compensation as they would be entitled to in like (?) cases of collecting taxes; the making of deeds which might be given pursuant to sales for default in the payment of such assessment *prima facie*

evidence of recited facts, and according to judgments for sale of any real estate for unpaid assessments, conclusive evidence of regularity, there being no jurisdiction in the court for the rendition of such judgments.

From the foregoing it would appear that the scope of the proposed assessment was designed to be coextensive with the limits of the District of Columbia, and its effect to create a lien upon the lands, lots, and blocks situated in said District whereon it might be imposed.

If tested by the recognized canons of interpretation on the one hand and of construction on the other, the power here sought to be conferred is found to be incapable of execution, the resulting attempt at assessing, no less than the threatened levy, must prove ineffectual. The power to assess, as well as the limitation upon it, and the manner of its exercise are, as we have seen, indicated by the first and second clauses of the sixth section. It is upon the just interpretation and reasonable construction of these two clauses that the ~~valid-~~ sufficiency ity, no less than the existence, of this power depends. The power itself, being in derogation of common right, must not only be indicated, but it must be conferred in terms which leave its execution free of all rational doubt and which bring its operation clearly within the pale of legal requirement. No intendment should be evoked to supply the defective expression of legislative intent in a taxing measure such as this. The sanctity of private property prohibits the exercise of judicial astuteness in aid of public spoliation.

"I cannot speculate as to the intentions of the legislature in the presence of words which appear to me to be quite plain."

Samuel *vs.* Nettleship, 2 Q. B. Rep., 188.

"It has been hitherto propounded that words are to be taken in their ordinary sense; it now requires to be added, and not to be extended beyond it, to comprehend a case within the supposed meaning of the legislature."

Potter's Dwarris, p. 203.

"They," *i. e.*, the judges, "are not (as the most learned members of a learned body must know) to *presume* the intentions of the legislature, but to *collect them* from the words of the act of Parliament; and they have nothing to do with the policy of the law. This is the true sense in which it is so often impressively repeated, that judges are not to construe statutes by equity or views of policy, but to collect the sense of the legislature by a sound interpretation of its language, according to reason and grammatical correctness."

Ibid, p. 204.

Courts cannot supply defective enactments by an attempt to carry out fully the purposes which may be supposed to have occasioned those enactments.

27 Me., 285.

A *casus omissus* in a statute cannot be supplied by judicial interpretation.

4 Gilman, 208; 14 Johnson, 479; 15 Me., 167; 6 Pickering, 362; Peter's Con. R., 669; 6 Mo., 257; 7 Wend., 241; 2 Binney, 279; 8 Johnson, 322.

Where rights are infringed, fundamental principles overthrown, and the general system of the law is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design on the part of the legislature to effect such objects.

1 Peter's Cond. R., 425.

Statutes are never to be construed so as to work injustice.

7 Johnson, 495, 496.

NOTE.—The fund to be realized by the assessment is to be kept separate and *may* be paid out by the Treasurer for lands taken.

"The word 'may' is imperative where the rights and interests of the public are concerned or where the public or

third persons have a claim *de jure* that the power shall be exercised or the duty performed."

4 Gilman, 20; 5 Cowen, 195; 14 S. & R., 129; 1 Eng. Com. Law, 46; 1 Peters, 46; Saunders, 58, Note 2; 2 Salkeld, 609; Croke, Elizabeth, 655; Croke, Jac., 134.

Where a statute makes no exceptions, courts can make none.

25 Miss., 571.

The rules for the construction of statutes are the same at law and in equity.

Peter's C. C. Rep., 188.

A statute shall never have an equitable construction to overthrow an estate.

Dwarris, 729.

Where a statute requires a thing to be done in a particular way, that way alone must be pursued.

3 Brevard, 306.

A statutory power, derogatory to private property, ought to be construed strictly, and not enlarged by intendment.

Dwarris, 750.

Statutes which are in derogation of the common law and which have the effect to divest or affect the title to real estate are to be strictly construed.

2 Mich., 486; 4 Hill, 776.

Applying the foregoing canons of interpretation to the clauses of the act in question, it is easy to perceive wherein the power of benefit assessment thereby sought to be conferred is absolutely incapable of execution. This is observable—

1. In respect of the measure of proposed assessment or the rule by which it shall be apportioned—*ex. gr.*, "The com-

mission, having ascertained the cost of the land, including expenses, shall assess *such* proportion of such cost and expenses upon the lands," etc. The act will be searched in vain for the absolutely essential noun which the adverb "such," in order to be sensible, must here qualify. This is no merely grammatical criticism. It is necessary to the lawful discharge of this sovereign function that the limitation upon its operation should be legislatively and distinctly defined. Coupled with the command to assess must ever be the indispensable restriction upon the amount of the assessment and prescription of the rule by which it shall be apportioned. The purpose is plain to make special benefits a total or partial compensation for the cost and expenses of location and improvement; but to what extent or in what proportion is left wholly unexpressed in this first clause of the sixth section.

As was justly observed by Mr. Justice Cox upon this point:

"If the court were asked to direct the commission by mandamus to discharge the duty devolved upon them by this clause, what direction could the court give? What proportion could it direct the commission to assess upon the property? It seems evident that the clause is too uncertain to be executed, either voluntarily by the commission or under compulsion from the court, and they must be held to derive no authority to act under that clause."

If the first clause is inoperative, the second is not less so. The failure of the one to fix the essential bound to assessment is not supplied by the indeterminate suggestion in the other that if actual benefit shall not be found commensurate with "the estimated cost and expenses" the commission shall proceed to assess at discretion. By every recognized canon of construction, the purposes of the two clauses being to confer one and the same power upon one and the same agent, the clauses must stand or fall together. If the one be vague and the other indeterminate, and, *a fortiori*, if they

be repugnant one to the other, neither can be operative, and the authority sought to be conferred is abortive.

This we have shown to be the case in respect of the measure of the assessment. It is no less observable—

2. In respect of the objects of the assessment—*i. e.*, benefits.

Whether these are to be regarded as relative or absolute it is not easy to gather from the language of the first clause. Upon this point we venture to adopt once more the concise reasoning of the learned judge who presided at special term.

"It will be observed that the second clause provides for the contingency that real estate in the District of Columbia is not benefited to the full extent of the estimated cost and expenses; and it might hence be inferred that the first clause was intended to provide for the contingency that the benefits did extend to the whole amount of the cost and expenses, and that the first clause was intended to direct the whole of that cost to be assessed upon the several tracts, lots, or blocks of land situated in the District of Columbia in proportion to the benefits resulting to them respectively.

"But the language of the first clause is absolute and unconditional. 'The commission *shall assess*' is the language. The question is, What shall they assess? Can it mean that they shall assess the whole cost, apportioning it among the several tracts with reference to their *relative* benefits and without reference to their *actual* benefits? If so, it would, in the first place, be plainly unconstitutional, because it would make the several tracts pay for benefits they never received, and, in the next place, it would be in conflict with the second clause, which limits the assessments to the extent of the actual special benefits. Can the first clause mean that there shall be assessed upon the several tracts just such proportion *or portion* of the entire cost as the actual pecuniary benefit to them will amount to? If so, what was the use of the second clause? for that is just what that was intended to express. But even here, again, there would be a contradiction between the first and second clauses, for one directs the assessment to be made with reference to the *location and improvement* of the park and the other with reference to the *location* only. We must assume that Congress did not in-

tend to direct the same thing to be assessed by two different clauses, and still less to direct it to be done in two different ways.

"Bearing this in mind, when we examine the first clause we find that it has an uncompleted direction, making it entirely meaningless. It directs, not that the whole cost shall be assessed, but that '*such proportion*' of cost and expenses shall be assessed. What that proportion is is not stated. Instead of saying, 'Such proportion as may be determined by the commission' or as may be determined by one or other of certain considerations, the sentence is left incomplete and directs simply the assessment of 'such proportion,' without in any otherwise defining the proportion."

The difficulty, nay, the impossibility, of executing the law in question is again observable—

3. In respect of the standard of proposed assessment.

By the first of the clauses above quoted the commissioners are required to assess "such proportion of such cost and expenses upon the lands, etc., especially benefited by reason of the *location and improvement* of said park." The claim was made below in argument that the standard thus emphatically established by the first clause is limited by the second to "the location of the park," and that the words "and improvement" should be regarded as surplusage. Aside from the rule of construction which enjoins that legal intendment cannot be substituted for legal expression and, *a fortiori*, shall not override legal expression in a statute derogatory of common right, the appellees, in making this contention, are opposed by their own interpretation of the act according to which they have declared it to be their purpose to assess benefits as for the improvement no less than for the location of the park. (R., p. 7.)

"No system of improvement," says the learned judge in deciding the case at special term, "has been adopted; no money has been appropriated for the purpose of making improvements and no one knows that any ever will be appropriated. The only standard which the commissioners

would have for estimating benefits with reference to improvements would be found in their imagination as to what may be done at some indefinite time in the future. It is impossible that a just appraisement of benefits could be made on that basis. Here also, if the court were to attempt to enforce the duty charged upon the commissioners, it would find it equally impossible with such proceeding under the first clause, as already suggested."

The sole authority for making this assessment is to be found in the section of the statute under consideration. The terms by which that authority is sought to be conferred are, as we have seen, hopelessly obscure and fatally repugnant. The power itself is therefore, we submit, plainly incapable of execution.

The supreme court of New Jersey, in the case of The State *vs.* Hudson County Avenue Commissioners, 37 N. J. L., 12, were confronted with legislation in no degree more uncertain and contradictory than the act of Congress in question, and the observations of Chief Justice Beasley in adjudging the act to be invalid because incapable of execution may be well adopted in aid of the appellees' contention here.

The court in that case say:

"A legislative act of taxation, in order to be legal and effectual, must consist of something more than a mere declaration that a certain sum of money shall be raised out of the property within a county. Itself must distribute the burden. This is as essential as the designation of the amount to be raised; and not only the sum required must be stated and the property out of which it is to be made designated, but also some *certain standard of assessment must be established. No act of taxation can omit any of these components.*"

Certainty is of the essence of taxation. He who is to bear the burden has a right to know not only its purpose, but its limitation and the standard by which it is to be imposed, otherwise he must be at the absolute mercy of the impositor of the charge.

c.

As to the propriety of making the proposed assessment at this time:

Nothing, perhaps, demonstrates more conclusively the invalidity of the proposed assessment than the attempt to make it after the interval which has elapsed since the report of the commissioners of condemnation on the 19th of December, 1891, and its subsequent final approval by the court.

The appropriate time for assessing—*i. e.*, the only period at which assessment as for benefits could have been legally made, if at all—is established by the first clause of the sixth section in the only language therein used which is absolutely free of doubt.

The wording is "that the commission, having ascertained the cost of the land, including expenses, shall assess," etc.—that is to say, when or as soon as the commission shall have ascertained the cost, etc., they shall assess; not that "having ascertained," etc., they shall, at some future time, assess. The obvious purport of the words is that the work of assessment shall be coincident with or follow at once upon the process of condemnation. This is made evident by the subsequent provision for payment of the constitutional "just compensation" to land-owners out of the prescribed assessment. "All money so collected," says the act, "may be paid by the treasurer on the order of the commission to any persons entitled thereto as compensation for land or services." It is an axiomatic principle of constitutional law that the act of compensation shall be performed coincidently with the acquisition. The hand which seizes shall be the hand that pays. The citizen who is subjected to extraordinary burden shall, at least, be treated with ordinary justice. To postpone the time of compensation is to superadd a penalty on the land-owner's dispossession,

hence the court in Isam *vs.* The Mississippi Central R. R. Co., 36 Miss., 300, well said upon this point:

"To say that the owner shall be paid at any other time or in anything else than the measure of value known to the Constitution, or that he shall receive more or less than the loss of injury *then* capable of definite inquiry and ascertainment, or that his claim to this compensation shall be extinguished by the probable benefits which in the future may result from the construction of a road which may not be finished in sixteen years (the time limited by the charter) cannot, by any fair interpretation of the Constitution, be regarded as just compensation first made."

The fact that assessment is directed to be made as for benefits resulting from the location and improvement of the park does not justify the attempt to assess at this time. There are two objections, either of which is fatal to such attempt.

The one is that the assessment was intended to afford, at least in part, the means of compensation for land taken, and the payment of this compensation, we have seen, could not legally have been postponed beyond the period of acquisition.

The other is that it is a fact—undenied and undeniable—that no improvement whatever has been made of the park.

The Court declared in the District of Columbia *vs.* Prospect Hill Cemetery:

"Most extraordinary and unjustifiable would it be to levy such assessments before the proposed improvement was even begun."

If, again, the act be appealed to for the purpose of exhibiting a legislative intent to postpone, in fact, the payment of compensation in that clause of the sixth section which provides that—

"The assessment, when confirmed, shall be divided into four equal installments, and may be paid by any party in-

terested in full or in one, two, three, or four years, on or before which time all shall be payable, with 6 per centum annual interest on all deferred payments"——

—we have only to observe that it is no more competent for a court to sanction the expressed intention to violate legal requirement than it would be to connive at the implied purpose to do so.

It is perfectly plain that it was the purpose of the framers of the measure to provide, *primarily*, for the payment of lands taken by the transmuted value of supposed benefits to other lands in the District of Columbia not taken. Their estimate of these supposititious benefits enlarged, apparently, with the progress which they made in constructing the act; for while there is evidence in the phraseology of the first two clauses of the sixth section that their expectation on this point was confined to the modest limit of actual cost and expenditure, and possibly fell short of that limit, they had not reached the latter half of the section before their expanding confidence betrayed them into expressing the belief that the value of those benefits would exceed such cost and expenditure by more than ten thousand dollars!

Had this belief been well founded the objection must still have obtained that a compensation thus remitted to future and intermittent creation, based upon uncertain, arbitrary, and capricious standards of ascertainment and payable at no fixed period, was far short of being just, and therefore constitutional.

The act provides two funds for the attainment of the same object—*i. e.*, acquisition of lands for Rock Creek park. The one is by the assessment for benefits, and may be termed potential. The other is by the appropriation of $1,200,000, and may be termed actual. Neither is related to the other in terms or by necessary or remote implication. The one might be the alternation of the other, but the most ingenious interpretation that could be devised would fail to

disclose ground for holding that the expenditure of the one could by any possibility be supplied or reimbursed by collection of the other. It was practicable to have defrayed the cost of the land by assessment based upon proper estimates as the work of acquisition progressed or immediately upon its consummation. In that event or in any event the assessment must have been limited strictly to the cost of the park, and could not have included its improvement. (Cooley on Tax., 664; Minn. Linseed Oil Co. *vs.* Palmer, 20 Minn., 468; Schenely *vs.* Commonwealth, 36 Pa. St., 9; Chamberlain *vs.* Cleveland, 34 Ohio St., 551; Hanscomb *vs.* Omaha, 11 Neb., 37; Dashiell *vs.* Balto., 45 Md., 615.)

Upon this point the learned judge who tried the case at special term uses the following apposite language (the italics are our own):

"There is a further difference to be noted between the two classes. The assessment under the first clause was to be made with reference to the benefits resulting from both the *location and improvement.* In the second clause each tract is to be assessed to the extent of the benefits derived only from the *location* of the park. *At the present time* it is quite plain that no benefits are derived *from the location*, because the adjacent owners of property *have nothing which they had not before.* For this reason it appears that the commission have declared their intention of assessing with reference to both location and improvement. Their whole authority is derived under this second clause, and that does not authorize them to assess with reference to both *location and improvement*, and so far their proposed assessment is, therefore, without authority of law.

"But if it could be held to authorize such proposed assessment, the standard by which they are to be guided is so uncertain as to make the execution of the law as impossible under this as under the former clause. When a street is, by municipal ordinance, directed to be opened, graded, paved, or otherwise improved, we all know exactly what is to be done and what the effect will be upon adjacent property; but there is no law providing for the improvement of the park." * * * "I think, therefore, that the assess-

ment proposed to be made by the Commissioners is not authorized by the statute, and, as it would create a charge upon the record on the property of the complainants, it ought to be enjoined."

But the land has been already fully paid for by the expenditure of so much of the $1,200,000 actually appropriated for the purpose as was necessary, and the one-half of this sum is being reimbursed to the United States by the tax-payers of the District. There is therefore no purpose to which the fund, potentially created by assessment, can be applied.

Can there be a more palpable instance of ineffectual taxation?

We have shown that the proposed assessment in order to be legal would have to be limited to the cost of the park, including, possibly, incidental expenses; but the act provides for the levy and collection of an assessment which, in terms, may include more than the cost and expense of acquiring the park and extend $10,000 towards its improvement. For this there is no shadow of legal justification, and the exercise of the taxing power thus exhibited is so unreasonable, tyrannical, and unjust that it must shock the conscience and appeal in vain to the coercive agency of the Court. Fortunately, however, the framers of the act have overreached themselves, and the act in this particular becomes incapable of execution by reason of the failure to provide the necessary agents for its enforcement. The only officers who are charged with the administration of the potential fund for this purpose are such as are included in an impossible section of the act (section 8), and are, therefore, not only non-existent, but are incapable of being supplied.

The office of interpretation is to bring a sense out of the words and not to bring a sense into them. The spirit of the law may be referred to in order to interpret words ad-

mitting of two meanings, but never to extend a law to a case not within its fair meanings.

Beebe *vs.* Griff, 14 N. Y., 244.

McClusky *vs.* Crummell, 11 N. Y., 593.

In dealing with this feature of the case Mr. Justice Cox observes:

"The act then appropriates two distinct funds to the payment for these lands—first, what should be collected from assessments, and, next, from the general unappropriated money in the Treasury. These two features of the law can only be reconciled by assuming that the proceeds of the assessments, so far as they would go, *were to be applied first and only so much as might be necessary in addition thereto out of the general fund in the Treasury.*

"All this strongly implies that the assessment should be made immediately after the valuation in order to ascertain how much should be paid from the Treasury at large, the assessment being directed to be kept by the Treasurer as a separate fund to be applied to this object. It was therefore evidently not intended that the money should first be paid out of the Treasury of the United States and then afterwards they should make the assessment. Particularly cannot that be the case under existing circumstances. The law requires that the District of Columbia should reimburse the Treasury of the United States one-half of the amount paid out of the Treasury in four equal annual installments. That reimbursement, so far as the time which has since elapsed has allowed, it is understood, has been made by the District. If the assessments for benefits can be made now, it is the duty of the party assessed to pay the whole amount into the Treasury of the United States, and the effect will be as to one-half of the amount the Government will be paid twice—that is, it has already received payment from the District of Columbia, and would receive payment again from the parties assessed. The commission has no authority to apportion this assessment between the District and the Government.

* * * "The Commissioners, as I understand, drew orders upon the Treasury in favor of the parties entitled to

compensation for their land, and they were paid by the Treasury on those orders as vouchers. The law really only authorized the Commissioners to draw upon the money collected from assessments. Perhaps by fair implication they were authorized also to draw so much as the assessments failed to satisfy of the demands of the land-owners; *but the effect of their drawing upon the Treasury for the whole amount due for the land was a virtual ascertainment by them that there were no benefits to be assessed, because they had no authority otherwise to draw upon the Treasury for the whole compensation due to the owners.*"

The court of Appeals (pp. 54-55) adopt Mr. Bacon's interpretation of the section in 43 ch. 113, as an independent ground of their decision.

Whether the constitutionality of the sixth section is or is not open for adjudication, it is respectfully submitted that such adjudication is not now and has not been essential to the relief which is sought by the original and supplemental bills of complaint. On the contrary, the record discloses that the averments of these several pleadings exhibit other and equally broad grounds for the successive decrees of the two lower courts, and that those decrees, in turn, were expressly based as well upon a judicial interpretation of the sixth section and consequent ascertainment of the impossibility of executing the power of assessment therein sought to be conferred; the efflux of time since it was authorized to be made; the intervening payment in full for all lands taken; the absence of all authority for reimbursing for such payment, in whole or in part, from the proceeds of such assessment, in short, the present impossibility of exercising the authority to assess which devolves upon the appellants, and the like non-constitutional grounds, as upon the invalidity of the sixth section. No jurisdictional amount or value is in controversy, and it would seem to be matter of grave doubt, as the case is here presented, whether the appellate jurisdiction of the court attaches by virtue of the eighth section of the act of February 9, 1893, establishing a Court of Appeals for the District of Columbia (27 St., 434), in the

light of the subjoined adjudications (among others) by this Court:

Williams *vs.* Oliver, 12 H., 124; R. R. Co. *vs.* R. R. Co., 14 Wall., 636; Murdock *vs.* Memphis, 20 H., 636; Jenkins *vs.* Loenthal, 110 U. S., 222; R. R. Co. *vs.* Swann, 111 *Id.*, 379; King Bridge Co. *vs.* Otoe, 120 *Id.*, 225; De Saussure *vs.* Gaillard, 127 *Id.*, 216, 232–'4; Tucker and Gould, Notes on Rev. St., 178.

In conclusion, I beg leave to repeat:

1. The measure or proportion of the proposed assessment, no less than the standard by which it is to be made, are hopelessly indeterminate and incapable of intelligent ascertainment.

2. In order to conform to statutory requirement, the assessment must have been based upon estimates of cost and expenses made concurrently with the acquisition of the land and in payment of the just compensation therefor.

3. The mandate being to assess for the cost and expenses of location and improvement of the park, it becomes incapable of execution in presence of the admitted fact that no improvement, whatever, has, in fact, been made.

4. In the absence of any just criterion for determining the proportion of cost and expense for which the land specially benefited shall be assessed and of the definite standard by which such assessment shall be made, it is obvious that no such assessment can be legally imposed by the appellants, either voluntarily or under the compulsion of judicial process.

5. Without resorting to this assessment, the land composing the Rock Creek park has been already fully paid for out of the general appropriation made for that purpose

by the act, the one-half of which general appropriation is now being repaid to the United States, by general taxation of real estate within the District of Columbia, so that the purpose of such assessment has been anticipated and the occasion for making it no longer exists, and the making thereof, at this time, would result in the possible payment to the United States of $600,000 over and above the amount actually expended by them in the acquisition of a public park to which neither the District of Columbia nor its citizens have any scintilla of title.

6. The sixth section of the act is obnoxious to the grave objection that it imposes upon a restricted area of abutting real estate and a comparatively few individuals the burden of the cost and expense of acquiring land for a public park perpetually dedicated to the use and enjoyment of the people of the United States, wherein the citizen sought to be assessed enjoys no exceptional easement, which he has never solicited and to which he can acquire no title.

7. Local assessment can only be legitimate when imposed to pay for local improvements, clearly conferring special benefits on the properties assessed and to the extent of those benefits.

8. They cannot be imposed when the improvement is either expressed or appears to be for general public benefit; and

9. The period imperatively assigned by the act for making the proposed assessment ceased to exist with the report of the commissioners of appraisement, on the 19th of December, 1891, and the subsequent ratification of that report by the court, and there is absolutely no authority for assessing at this time, after the park has been fully paid for and the conditions no longer exist which alone would have justified the imposition of the proposed assessment.

10. The record discloses that the relief which is sought by the original and supplemental bills of complaint is not made thereby to depend exclusively upon the validity of the sixth section of the act in question, but that it is founded upon other and equally substantial grounds, no one of which is qualified to sustain the appellate jurisdiction of this Court, but any one of which is broad enough to support the decree from which this appeal was taken, and that such decree was actually based as well upon such sufficient and non-constitutional questions.

It is therefore respectfully submitted that the appeal should be dismissed or the decree of the Court of Appeals of the District of Columbia should be affirmed.

TALLMADGE A. LAMBERT,

Of Counsel.

WILSON *v.* LAMBERT.[1]

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 164. Argued December 13, 14, 1897. — Decided January 3, 1898.

Courts of equity have jurisdiction to hear the complaints of those who assert that their lands are about to be assessed and subjected to liens by a board or commission acting in pursuance of the provisions of a statute which has been enacted under the forms of law, but which, it is claimed, is unconstitutional, and therefore does not avail to confer the powers sought to be exercised.

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[1] The docket title of this case is Craighill & others *v.* Lambert & others.

The sixth section of the act of September 27, 1890, c. 1001, 26 Stat. 492, authorizing the establishment of Rock Creek Park in the District of Columbia, does not violate the provisions of the Constitution of the United States, and is valid.

In January, 1895, Mary Van Riswick, widow, and Avarilla Lambert, and Martina Carr, children and heirs of John Van Riswick, deceased, filed a bill of complaint in the Supreme Court of the District of Columbia against the Commission under the Rock Creek Park Act of September 27, 1890, c. 1001, 26 Stat. 492, seeking to restrain the said Commission from assessing lands of the complainants for any portion of the cost and expenses of locating and improving the Rock Creek Park, for the alleged reason that the sixth section of the said act, under which the Commission was acting in proposing to make such assessment, was unconstitutional and void.

The cause was so proceeded in that, on September 30, 1895, the Supreme Court of the District rendered a final decree as prayed for in the bill. From that decree an appeal was taken to the Court of Appeals of the District of Columbia, and by that court, on March 17, 1896, the decree of the Supreme Court of the District was affirmed. The cause was then brought to this court on appeal.

Mr. Solicitor General for appellants.

Mr. Tallmadge A. Lambert and *Mr. John B. Henderson* for appellees.

Mr. Justice Shiras, after making the above statement, delivered the opinion of the court.

Courts of equity undoubtedly have jurisdiction to hear the complaints of those who assert that their lands are about to be assessed and subjected to liens by a board or commission acting in pursuance of the provisions of a statute which has been enacted under the forms of law, but which is unconstitutional, and therefore does not avail to confer the powers sought to be exercised. *Dows* v. *Chicago*, 11 Wall. 108; *Union Pac.*

Railway v. *Cheyenne*, 113 U. S. 516; *Ogden City* v. *Armstrong*, 168 U. S. 224; Dillon's Mun. Corporations, vol. 2, § 922, 4th ed.

Accordingly if, in the present case, the sixth section of the act of September 27, 1890, entitled "An act authorizing the establishment of a public park in the District of Columbia," and upon which the defendants rely for their authority to act, is, indeed, unconstitutional and void, for all or any of the reasons urged against it, we think that the complainants are entitled to a remedy by a direct proceeding in a court of equity. For the reasons mentioned in the cases above cited and in numerous others, the remedy at law could not be regarded as plain and adequate.

The validity of the section in question has been heretofore considered and determined by this court in the case of *Shoemaker* v. *United States*, 147 U. S. 282. The objections which in that case were ably but ineffectually urged were, in the main, those of which we now hear. It is true, however, that the question there arose incidentally and by way of argument. Persons whose property was made liable to assessment for special benefits were not ostensible parties to the cause; nor was the question raised by any special assignment. Hence this court, though undoubtedly called upon to consider the validity of the act as a whole, and in all its parts and sections, did not deem it necessary to discuss the validity of the sixth section at any length. In view, however, of the fact that we are now confronted with a specific arraignment of the sixth section, and of the further fact that the courts below, in able opinions, have held that the section is fatally defective in form and substance, we have felt constrained to carefully reconsider the question.

It is obvious, and we understand it to be conceded, that neither the act, nor this particular part of it, can be assailed because the subject-matter is outside of the power of Congress. But, while the general power to legislate exclusively for the District of Columbia is not disputed, nor the competency of Congress, in the exercise of that power, to establish a public park, it is contended that, under the limitation upon

that power contained in the Fifth Amendment, protecting the citizen from being deprived of life, liberty or property without due process of law, Congress, when erecting a work which is expressly declared to be perpetually dedicated to the use and enjoyment of the people of the United States, should defray the cost thereof out of the funds of the entire nation. It is further contended in the brief of the appellees that a tax for raising a fund for such a purpose to be valid ought to be levied and apportioned as a direct tax, among the several States according to their respective numbers. This latter proposition, however, was not approved by the courts below, and we need not discuss it. *Craighill* v. *Van Riswick*, 8 D. C. App. 185.

The reasoning upon which those courts proceeded seems to have been that, upon general principles of constitutional law, when the works, whose cost is to be defrayed by taxation, are public, the public alone should pay for them, and the present case is compared to one where, upon the erection of a court house or post office, the private property of individuals adjacent to such structure should be specially taxed for the supposed greater convenience enjoyed of access thereto.

Upon a final analysis this proposition will be found to resolve itself into a denial of the validity of special assessments in any case where the work in question is undertaken by the public authorities, without the express assent or desire of the property holders. The effort made to distinguish between streets and highways, as constituting proper subjects of taxation for special benefits, and public parks, as matters of such a general nature as not to justify special assessment, does not appear to us to be successful. Legislation of this character, both in respect to its justice and its constitutional validity, has been thoroughly discussed by the judicial tribunals of nearly every State in the Union. We shall briefly notice a few of the leading cases.

By a statute of 1875 a board of park commissioners were authorized to locate and lay out within the city of Boston a public park, to take such lands as the board should deem desirable therefor, and to assess upon any real estate in Bos-

ton which, in the opinion of the board, should receive any benefit or advantage from such locating and laying out, beyond the general advantages to all real estate in the city, "a proportional share of the expense of such location and laying out." The board purchased a large tract of flats, over part of which the tide flowed, the rest being marsh, and proceeded to lay out avenues and to fill them with gravel; and when but a small part of the area was filled, and none of the avenues were completed, passed an order declaring that they had taken, and did thereby take and create a public park, certain land, being in fact that already purchased, and also passed a further order reciting that, whereas by the previous order a park was located and laid out, they laid an assessment upon certain lands benefited thereby. It was held by the Supreme Judicial Court of Massachusetts, on a petition for a writ of certiorari, by the owners of estates so assessed, to quash the assessment, that the park was laid out within the statute, and that the court could not say, as matter of law, that the estates of the petitioners had not been benefited by what had been done at the time the assessment was made. *Foster* v. *Park Commissioners of Boston*, 133 Mass. 321; *Holt* v. *Somerville*, 127 Mass. 408.

In 1834, in pursuance of authority given by statute, the common council of the city of Albany directed the opening of a public square in that city. It was held by the Supreme Court of the State of New York that the taking the grounds of individuals in a city, to convert into a public square, is taking property for public use as much so as if such grounds were converted into a street; and the fact of the damages being assessed upon the owners of adjoining property, instead of being levied as a general tax upon the city, is no evidence that the property is not taken for public use. In the opinion it was said by Chief Justice Savage:

"The second reason assigned against the constitutionality of these proceedings is that the purposes for which the property is thus taken are not public, because the benefit is limited to and the expense assessed upon a few individuals. Private property is taken for public use when it is appropriated to the

common use of the public at large. A stronger instance can not be given than that of a lot of an individual in a city converted into a street; the former owner has no longer any interest in or control over the property, but it becomes the property of the public at large, and under the control of the public authorities. A public square depends on the same principle; it is for public use, whether it is intended to be travelled upon or not. The mode of compensation for such property is not important. It was formerly out of the public purse; but there is no injustice in requiring those individuals to make compensation who receive from the improvement an equivalent or more in the enhanced value of their own adjacent property; and whether the number is large or small does not affect the question." *Owners of Ground* v. *Albany*, 15 Wend. 374.

So, in 1871, it was held by the Court of Appeals of New York, in the case of the erection of a public park in the city of Brooklyn, that lands taken for such a purpose are taken for a public use, and the right to assess benefits upon adjacent property was assumed as unquestionable. *Brooklyn Park Com.* v. *Armstrong*, 45 N. Y. 234; *In re New York Central Park*, 63 Barb. 282; *S. C.* 99 N. Y. 569. The validity of laws authorizing the condemnation of lands for the purpose of public parks has been affirmed by the Supreme Court of Illinois, *People* v. *Williams*, 51 Illinois, 63; *Cook* v. *South Park Com.*, 61 Illinois, 115; *West Chicago Park Com.* v. *Western Union Tel. Co.*, 103 Illinois, 33; and by the Supreme Court of Pennsylvania, *Mercer* v. *Pittsburgh, Fort Wayne & Chicago Railroad Co.*, 36 Penn. St. 99; and by the Supreme Court of Missouri, *St. Louis Co.* v. *Griswold*, 58 Missouri, 175. Numerous other cases to the same effect will be found collected in Dillon's Mun. Corp. vol. 2, sec. 643, 4th ed.

That the act dedicates and sets apart this park "for the benefit and enjoyment of the people of the United States" does not, as we think, make it so far a work *sui generis* as to take it out of the range of the principles of the foregoing cases. The residents and property holders of the District of Columbia must be regarded as coming within the class of beneficiaries;

and, so far from being injured by the declaration that the park shall also have a national character, it is apparent that thereby the welfare of the inhabitants of the District will be promoted. Whatever tends to increase the attractiveness of the city of Washington, as a place of permanent or temporary residence, will operate to enhance the value of the private property situated therein or adjacent thereto.

If, then, there be no solid ground of distinction between other works of public improvement and the public park designed by this legislation, as proper subjects for the application of the rule of assessment for special benefits, it will not be necessary for us to enter at large upon the subject apart from that supposed distinction. That has been so recently and so fully discussed by this court in the case of *Bauman* v. *Ross*, 167 U. S. 548, that nothing remains to be added. It may be proper to observe that the decision in that case was not announced till after the judgment in the courts below in the present case had been entered.

Having reached the conclusion, then, that the sixth section of the Rock Creek Park Act is not invalid for want of conformity to constitutional principles, we think it follows that the decrees of the courts below should be reversed, and the bill of complaint be dismissed.

The other objections, so forcibly dwelt on, are all questions of construction and administration, and should be permitted to arise and be determined in the regular procedure of the court to which Congress has assigned the duty of carrying the provisions of the act into effect. It may turn out that the practical difficulties anticipated may disappear when dealt with by that court, to which power is given to "hear and determine all matters connected with said assessment, and to revise, correct, amend and conform said assessment, in whole or in part, or order a new assessment." It does not yet appear that these appellees will, when final action shall have been taken, have any substantial grounds of complaint. The difficulties of construing the act are not necessarily in the act itself, but in its application to the subject-matter. Its provisions are somewhat vague and obscure; and it is possible that further legis-

lation may be found requisite to carry out the intentions of Congress. But such questions are not now before us for determination. Should errors supervene in the administration of the act, parties affected will have redress by appeal.

We adopt the observation made in the dissenting opinion in the Court of Appeals: "There can be no reason or propriety in appealing to a court of equity to restrain proceedings that are being conducted in other courts, competent to construe the statutes under which they act, and to decide every question that may arise in the course of the proceeding. To allow litigations to be thus diverted tends to the multiplication of litigation, and the production of unnecessary delay and expense — to say nothing of the unnecessary vexation to parties."

The decree of the Court of Appeals is reversed; and the cause is remanded with directions to said court to reverse the decree of the Supreme Court of the District of Columbia and to remand the cause to that court with directions to dismiss the bill of complaint.